Supreme Court, U.S.
FILED

95 • 224 AUG 8 1995

OFFICE OF THE CLERK

No. 95-

In The

Supreme Court of the United States

October Term, 1995

BARBARA KRAEBEL Doing Business As
BARKLEE REALTY COMPANY,

Petitioner,

-against-

FELICE MICHETTI, As Commissioner Of
The New York City Department Of Housing
Preservation And Development, and
THE NEW YORK CITY DEPARTMENT OF
HOUSING PRESERVATION AND DEVELOPMENT,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

Barbara Kraebel D/B/A
Barklee Realty Company
Petitioner *pro se*
60 East 42nd Street – #1146
New York, New York 10165
Telephone: (212) 831-1012

August 7, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether due process of law or equal protection of the laws preclude a municipal agency from making selective inspections under vaguely-worded municipal housing code provisions.

2. Whether a municipal agency violates an owner's Fourth Amendment right against unreasonable searches by making unsolicited warrantless inspections of a property without good cause and not in the course of a generally-applicable inspection program even if the person in possession provides access.

3. Whether due process of law or equal protection of the laws give an owner the right to attend housing inspections and confer with the municipal inspectors concerning reported violations.

4. Whether due process of law permits a municipal agency to continue reporting housing violations which have become unenforceable by lapse of time.

5. Whether perpetual accrual of daily fines for housing violations disproportionate to the offense and in amounts the owner cannot reasonably pay violates the owner's Eighth Amendment protection against excessive fines.

6. Whether an owner can bring an Eighth Amendment challenge to continuing accrual of daily fines and criminal penalties for housing violations before the administering agency brings a legal proceeding to enforce them.

7. Whether government accrual of daily fines in perpetuity for housing code violations that would retroactively take all value from a property constitute a taking of the property.

8. Whether dissemination of municipal records containing unproven allegations of housing violations and related criminality to courts, state agencies and tenants for use as *prima facie* evidence in administrative and legal proceedings to sanction the owner violates the owner's due process rights.

9. Whether a federal court can dismiss federal claims brought against municipal agencies because there are remedies for such claims under state law.

10. Whether state proceedings uncertain as to jurisdiction and threatening an owner with excessive fines and imprisonment based on presumptions of the owner's guilt provide adequate state remedies to determine the owner's federal constitutional challenges to municipal regulations.

11. Whether a federal court can grant summary judgment or dismissal without giving presumptive weight to the non-moving party's allegations and supporting evidence.

12. Whether a federal court on a summary judgment motion can decide disputed issues of fact in the moving party's favor.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

GROUNDS FOR JURISDICTION 2

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS 2

A. Constitutional Provisions 2

B. Statutory Provisions 2

C. Regulatory Provisions 3

STATEMENT OF THE CASE 3

A. Statement of Facts 5

B. Prior Proceedings 10

C. District Court Jurisdiction 12

REASONS FOR GRANTING THE WRIT 13

I. THE DETERMINATIONS OF THE COURT BELOW ON IMPORTANT ISSUES CONCERNING MUNICIPAL REGULATION OF REAL PROPERTY CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT .. 13

A. *Connally v. General Const. Co.* and *Yick Wo v. Hopkins* Preclude Selective Enforcement Of Vague Housing Maintenance Standards ... 13

B. The Decision Below Authorizes Regulatory Searches Which *Camara v. Municipal Court* and *See v. City of Seattle* Preclude 14

Page

C. The Decision Below Is Inconsistent With *Armstrong v. Manzo* In Enabling A Municipality To Prosecute Violations Without Limitation Of Time 15

D. The Decision Below Conflicts With *Ex Parte Young* and *Steffel v. Thompson* In Authorizing Accumulation Of Excessive Daily Fines And Criminal Penalties Without Permitting Any Federal Court Challenge To Their Constitutionality 16

E. The Decision Below Endorses Dissemination Of Government Records For Use In Enforcement Proceedings Which Do Not Meet The Due Process Standards of *Goldberg v. Kelly* 17

F. The Decision Below Conflicts With *Kaiser v. Aetna* In Burdening Petitioner With Liabilities That Constitute A "Taking" Of The Property 18

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER IN THIS CASE BECAUSE THE COURTS BELOW HAVE DEPRIVED PETITIONER OF A FAIR HEARING ON PETITIONER'S FEDERAL CLAIMS IN DISREGARD OF THIS COURT'S RULINGS 20

A. *Patsy v. Florida Board of Regents* and *Monroe v. Pape* Permit Petitioner To Bring Due Process Claims In Federal Court Irrespective Of State Remedies 20

Page

B. The Decision Below Relegates Petitioner To State Remedies Which Are Inadequate To Determine Federal Claims And Do Not Meet This Court's Standards For Fair Hearings 21

C. The Decision Below Conflicts With *Conley v. Gibson*, *Adickes v. Kress*, and *Anderson v. Liberty Lobby* By Giving Insufficient Weight To Petitioner's Allegations and Supporting Evidence, By Giving Presumptive Weight To Respondents' Unsupported Assertions, and By Determining Disputed Facts In Respondents' Favor 24

CONCLUSION 27

APPENDICES:

Appendix A: Decision of the United States Court of Appeals for the Second Circuit filed May 8, 1995..... 1a

Appendix B: Memorandum Opinion and Order of the Southern District of New York (Judge John S. Martin, Jr.) dated August 19, 1994..... 4a

Appendix C: Judgment of the Southern District of New York issued August 30, 1994 ..... 30a

Appendix D: Order of the United States Court of Appeals for the Second Circuit filed June 28, 1995 denying Petitioner's application for a rehearing *en banc*..... 32a

Page

Appendix E: Fourth, Fifth, Eighth, and Section 1, Fourteenth Amendments, U.S. Constitution 34a

Appendix F: §1983, Title 42, United States Code ... 36a

Appendix G: §§27-2005, 27-2111, 27-2115(a) through (g), and 27-2116 through 27-2119, New York City Housing Maintenance Code 37a

Appendix H: §§201 and 214.2, New York Civil Practice Law and Rules 49a

Appendix I: §110, New York Civil Court Act, and Legislative Findings 50a

Appendix J: §328, New York Multiple Dwelling Law 59a

Appendix K: Chapter 9, New York City Department of Housing Preservation and Development Rules and Regulations 61a

Appendix L: Procedure No. 1-1993, New York City Department of Housing Preservation and Development 64a

TABLE OF AUTHORITIES

Page(s)

CASES

Adickes v. S.H. Kress & Co., Inc., 398 U.S. 144 (1970) 5, 24, 26

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 24, 26, 27

Armstrong v. Manzo, 380 U.S. 545 (1965) 15, 16, 23

Brady v. Rudin Management Co., 13 A.D.2d 80, 213 N.Y.S.2d 233 (1st Dept. 1961), *reversed on other grounds*, 11 N.Y.2d 681, 225 N.Y.S.2d 757 15

Camara v. Municipal Court, 387 U.S. 523 (1967) 14, 22

Conley v. Gibson, 355 U.S. 41 (1957) 24

Connally v. General Construction Co., 269 U.S. 385 (1926) 13

Ex Parte Young, 209 U.S. 123 (1908) 16, 17, 23

Goldberg v. Kelly, 397 U.S. 254 (1970) 17, 18, 23

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 18, 19

Kelly v. Railroad Retirement Bd., 625 F.2d 486 (3rd Cir. 1980) 15

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) 22

Kraebel v. Dept. of Housing Pres. & Dev., 959 F.2d 395 (2d Cir.), *cert. den.*, ___ U.S. ___, 113 S.Ct. 326 (1992) 20

Monroe v. Pape, 365 U.S. 167 (1961) 20

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 20

See v. City of Seattle, 387 U.S. 541 (1967) 14

Steffel v. Thompson, 415 U.S. 452 (1974) 17

Page(s)

U.S. v. Buettner-Janusch, 646 F.2d 759 (2d Cir.), *cert. den.*, 454 U.S. 830 (1981) 14

U.S. v. Hooker Chemical & Plastics Corp., 748 F.Supp. 67 (W.D.N.Y. 1990) 16

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 13

STATUTES AND RULES

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 12

28 U.S.C. §1343 12

28 U.S.C. §2201 12

28 U.S.C. §2202 12

28 U.S.C. §2403(b) 2

42 U.S.C. §1983 ..... 2, 10

Fed. R. Civ. P. 12(b) 11

Fed. R. Civ. P. 56 11

N.Y. Civ. Court Act §110 ..... 3, 21, 22

N.Y. Civ. Pract. Law and Rules Art. 78 ..... 23, 24

N.Y. Civ. Pract. Law and Rules §201 ..... 3, 15

N.Y. Civ. Pract. Law and Rules §214.2 ..... 3, 15

N.Y. Multiple Dwelling Law §328 ..... 3, 10, 12, 17, 22

N.Y.C. Hous. Maint. Code §27-2005 ..... 3, 6, 13

N.Y.C. Hous. Maint. Code §27-2111 ..... 3, 8

N.Y.C. Hous. Maint. Code §27-2115(a) 3, 8

Page(s)

N.Y.C. Hous. Maint. Code §27-2115(b) 3, 6, 22
N.Y.C. Hous. Maint. Code §27-2115(c) 3, 6
N.Y.C. Hous. Maint. Code §27-2115(f) ... 3, 6, 14, 15, 22
N.Y.C. Hous. Maint. Code §27-2116(b) 3, 23
N.Y.C. Hous. Maint. Code §27-2116(c) 3, 23
N.Y.C. Hous. Maint. Code §27-2117(b) 3, 21
N.Y.C. Hous. Maint. Code §27-2118 ..... 3, 8
N.Y.C. Hous. Maint. Code §27-2119 ..... 3, 8

U.S. Constitution Sections

Fourth Amendment 2, 11, 14
Fifth Amendment 2, 11
Eighth Amendment 2, 11, 16
Fourteenth Amendment 2, 11

No. 95-___

In The

Supreme Court of the United States

October Term, 1995

BARBARA KRAEBEL Doing Business As
BARKLEE REALTY COMPANY,

Petitioner,

-against-

FELICE MICHETTI, As Commissioner Of
The New York City Department Of Housing
Preservation And Development, and
THE NEW YORK CITY DEPARTMENT OF
HOUSING PRESERVATION AND DEVELOPMENT,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals, which is apparently not officially or unofficially reported, is Appendix A hereto. The decision of the United States District Court, Southern District of New York, which is apparently unofficially reported as *Kraebel v. Michetti*, No. 93-4596 (JSM), 1994 WL 455468 (S.D.N.Y. Aug. 22, 1994), is Appendix B hereto.

GROUNDS FOR JURISDICTION

The District Court denied Petitioner's cross-motion for partial summary judgment and denied and dismissed the Complaint by judgment entered August 31, 1994 (Appendix C). The Court of Appeals affirmed said judgment on May 8, 1995. This Petition is timely filed under Rule 13.1 of this Court. This Court has jurisdiction under 28 U.S.C. §1254(1) and Rules 10.1(a) and 10.1(c) of this Court.

As required by Rule 29.4(c) of this Court, Petitioner states that 28 U.S.C. §2403(b) may be applicable because this proceeding draws into question the constitutionality of a State statute. Under said provision, the District Court so certified to the New York State Attorney General on December 7, 1993.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

A. Constitution Provisions.

Fourth Amendment (Appendix E)

Fifth Amendment (Appendix E)

Eighth Amendment (Appendix E)

Fourteenth Amendment, Section 1 (Appendix E)

B. Statutory Provisions.

United States Code, Title 42, §1983 (Appendix F)

New York City Housing Maintenance Code, §§27-2005, 27-2111, 27-2115 (a) through (g), and 27-2116 through 27-2119 (Appendix G)

New York Civil Practice Law and Rules §§201 and 214.2 (Appendix H)

New York Civil Court Act §110 and Legislative Notes (Appendix I)

New York Multiple Dwelling Law §328 (Appendix J)

C. **Regulatory Provisions.**

New York City Department of Housing Preservation and Development Rules and Regulations, Chapter 9 (Appendix K)

New York City Department of Housing Preservation and Development Procedure No. 1-1993 (Appendix L)

STATEMENT OF THE CASE

This case presents the issues as to whether municipal housing maintenance regulations and related enforcement mechanisms must be designed and administered in compliance with the federal constitutional rights of property owners and, if they are not, whether federal courts must take jurisdiction of cases brought to challenge such noncompliance.

The District Court opinion did not address these issues in a meaningful way but discounted Petitioner's allegations and evidence and denied Petitioner's claims on the basis of statutory provisions and Respondents'

assertions as to how the regulations work. Summary judgment was granted in Respondents' favor despite Petitioner's detailed allegations, documentary proof, lack of any discovery in the proceeding, lack of agreed facts, lack of a hearing, lack of any substantiation from Respondents' records as to Respondents' assertions, and the fact that much evidence supportive of Petitioner's allegations is within Respondents' sole control. The only evidence supporting Respondents' motions were affidavits of an Assistant Commissioner of Respondent New York City Department of Housing Preservation and Development (HPD) who did not work for HPD when most of the activities at issue occurred and has no independent personal knowledge as to many of the matters in Petitioner's claims. Many findings in the opinion are refuted by documentary evidence in the record. Some may cut off claims and defenses which the opinion relegates Petitioner to state court to litigate.

To the extent the District Court considered the issue of federal court jurisdiction, it denied such jurisdiction on the basis of allegedly adequate state remedies. It discounted Petitioner's allegations and evidence that such remedies were non-existent, inadequate, and unreasonably risky.

The Second Circuit Court did not independently address any of Petitioner's claims, unanimously affirming the District Court decision without a separate opinion and denying Petitioner's motion for a rehearing *en banc* without a vote.

The refusal of the Courts to give Petitioner's claims the presumption in their favor on Respondents' motion

and the determinations of disputed facts on a summary judgment motion conflict with numerous decisions of this Court, including *Adickes v. S.H. Kress & Co., Inc.*, 398 U.S. 144, 157-161 (1970).

Petitioner brought these claims in federal court because of the inadequacy, inequity and peril in state remedies. Not only are Petitioner's property rights at issue but also Petitioner's fundamental right to be free from unsolicited warrantless searches of the Property without good cause, from unproven and slanderous governmental charges of wrongdoing and criminality, and from the perpetual threat of civil and criminal prosecution under constitutionally-unacceptable presumptions and procedures.

Owners of small buildings are particularly prejudiced by the regulatory abuses at issue here because such owners do not have the resources to comply with unreasonable governmental requirements or to pay the administrative and legal costs necessitated by an oppressive regulatory scheme. Such abuses often drive such owners out of business, into bankruptcy, or into abandonment of their properties without any opportunity for a determination of their constitutional rights in the matter. This proceeding seeks to determine whether federal rights provide any protection to such an owner.

A. Statement of Facts.

Petitioner, a New York proprietorship, owns a 16-unit apartment building in the City, County, and State of New York (Property). The N.Y.C. Housing Maintenance Code

(HMC)* provides standards for the maintenance and preservation of residential buildings in the City, including the Property. Respondent New York City Department of Housing Preservation and Development (HPD) administers the HMC.

HPD must serve a Notice of Violation (NOV) on the owner for each HMC violation reported against a property. If the owner certifies to correction on the NOV, HPD must remove the violation from its records within 70 days unless HPD re-inspects and notifies the owner of HPD's reasons for setting aside such certification. HMC §§27-2115(b), (c), and (f).

HPD records show 31 HMC violations outstanding against the Property (Violations). Twenty-five of these Violations were issued under HMC §27-2005, which requires owners to "keep the premises in good repair" and to "comply with the provisions of [the HMC]". None of the Violations are classified as rent-impairing under HPD regulations. Eight are Class A (non-hazardous), 22 are Class B (hazardous), and one is Class C (immediately hazardous).

Many of the Violations are vaguely worded and Petitioner cannot tell from them what HPD objects to. The HMC makes some of the Violations the responsibility of tenants or other third parties. Tenants caused some of the Violations or prevented Petitioner from correcting them.

Petitioner did not receive NOVs for six of the Violations. Certificates of correction for 15 of the

---

* Chapter 2 (§§27-2001 through 27-2152) of Title 27 of the New York City Administrative Code.

Violations were due more than three years ago. Petitioner certified to correction of 23 of the Violations more than 70 days ago. HPD set aside some of Petitioner's certifications without explanation, showing these Violations in its computerized records as "FALSE CERTIFIED," and admits that it never gives reasons when setting aside owner certifications.

HPD includes all violations of a Class reported on the same date on one four-part carbonized NOV. HPD refused to provide Petitioner with duplicate NOVs when Petitioner did not receive the originals or used them for partial certifications. When in the absence of NOVs Petitioner certified to correction on copies of NOVs or on substantially identical forms, HPD did not reflect these certifications in its computerized records but shows the Violations as "OVERDUE".

Six of Petitioner's certifications conformed strictly to HPD's requirements. The others were on copies or re-creations of HPD's official four-part NOVs, were not submitted within the required time periods, or inadvertently omitted non-essential information.

Of the 23 Violations Petitioner certified as corrected, HPD's computerized records show ten as "OVERDUE", five as "FALSE CERTIFIED", and eight as "LATE CERTIFIED". All of the "FALSE CERTIFIED" Violations and one of the "OVERDUE" Violations were timely certified. Seven more of the "OVERDUE" and "LATE CERTIFIED" Violations were corrected within the required period, but the certifications were late because Petitioner did not receive the NOVs or needed duplicate NOVs for partial certifications.

HMC fines for Class A violations are from $10 to $50, for Class B violations are from $25 to $100 plus $10 per day, and for Class C violations are from $50 to $150 plus $125 per day. Daily fines accrue from the day owner certification of correction is due until the violation is deemed corrected. The City uses the fines to pay costs of repair and rehabilitation of multiple dwellings under its supervision. Criminal penalties may also be imposed for the violations. HMC §§27-2115(a), 27-2111, 27-2118 and 27-2119.

When Petitioner brought this proceeding, HMC fines for the Property had accrued to approximately $360,000, and they were continuing to accrue at the rate of approximately $345 per day or $10,350 per month. The gross rents at the Property were $3,200 to $4,200 per month.

HPD makes inspections with tenants present but does not permit owners to attend. In 1991 HPD instituted a Dismissal Request Inspection (DIR) Procedure, under which it makes inspections for owners at a cost of $300. At such inspections HPD can remove improper and corrected violations but also report new violations.

HPD makes inspections to report violations without charge but does not remove improper or corrected violations except under the DIR Procedure. Petitioner cannot afford to pay for inspections under the DIR Procedure or to make the unnecessary improvements which new violations might entail.

Respondents single out older rent-regulated buildings in low-income neighborhoods for repeated unsolicited inspections while giving scant attention to comparable neighboring buildings owned by public, non-

profit, or cooperative entities or to older buildings in other neighborhoods. Such disproportionate enforcement has been a significant factor in driving virtually all private owners of rent-regulated properties in many low-income neighborhoods in New York City out of business, enabling the City to seize their properties for transfer to preferred owners.

In recent years HPD has singled out the Property for such unsolicited inspections. HPD conducted at least 21 inspections of the Property between April 1989 and commencement of this proceeding in July 1993. All but two were on HPD's own initiative and without probable cause. Two were roof-to-basement inspections made when Petitioner requested duplicates of NOVs that Petitioner had not received.

There is no administrative remedy if HPD improperly issues violations or doesn't remove corrected violations. Although HPD must consult with owners as to the work required to correct violations, such consultations are with office personnel unfamiliar with the Property and these personnel have no authority to remove violations from the record. Respondents will not allow Petitioner to consult with inspectors familiar with conditions at the Property.

While theoretically Petitioner could bring a proceeding in the Housing Part of New York City Housing Court to remove the Violations, Petitioner deems the risk unacceptable, having experienced significant due process violations in a previous case in said Part. Knowledgeable Court personnel have denied to Petitioner that such a proceeding can be brought in the Housing Part.

HPD selectively enforces HMC violations. HPD has taken no action to enforce the Violations and has no present intention of doing so because the Property does not fall within its enforcement parameters. Nonetheless, HPD will not remove any of the Violations from its records until they are deemed corrected by an HPD inspector or in a legal proceeding.

HPD claims the right to bring legal proceedings to enforce the Violations at any time. In such proceedings Petitioner would be required to defend against fines and penalties by proving, among other things, that the Violations did not exist when issued, that they were corrected within the time specified in the NOV, or that they were caused by a third party. Given the time that has elapsed since the Violations were reported and/or corrected, such defenses would be virtually impossible for Petitioner to prove. Third party obligors are no longer available.

Pursuant to N.Y. Multiple Dwelling Law §328, HPD provides computerized records of the Violations to the New York State Division of Housing and Community Development (DHCR), the New York City Housing Court, and tenants. These records have been used to penalize Petitioner with rent abatements, denial of rent increases, and other sanctions in proceedings to which HPD is not a party and at which HPD inspectors have not testified.

B. Prior Proceedings.

Petitioner brought this proceeding under 42 U.S.C. §1983 and pendant jurisdiction over state claims. Petitioner sued to prevent Respondents from making

unsolicited warrantless inspections of the Property in violation of Petitioner's Fourth Amendment rights; to require HPD to remove the Violations recorded and continued under procedures which violate Petitioner's due process and equal protection rights under the Fourteenth Amendment; to compel HPD to remove and cancel fines for the Violations after statutes of limitation, *laches* and due process rendered them unenforceable by lapse of time; for a declaration as to the constitutionality of HMC fines under the Eighth Amendment; for a declaration as to the constitutionality under the due process protections of the Fourteenth Amendment of disseminating HPD's computerized violation records to third parties for enforcement purposes; and to enjoin Respondents from such dissemination.

Finally, in lieu of the foregoing, Petitioner sought (i) a declaration that the HMC and Respondent's enforcement thereof constitute a regulatory taking of the Property under the Fifth and Fourteenth Amendments and (ii) an order requiring Respondents to accept a deed to the Property from Petitioner in full satisfaction of all HMC requirements and fines and to pay Petitioner monetary damages for such taking.

Respondent answered and moved under Fed. R. Civ. P. 12(b)(6) to dismiss the Complaint for failure to state a cause of action and under Fed. R. Civ. P. 56 for summary judgment.

Petitioner opposed said motions and cross-moved under Fed. R. Civ. P. 56(a) for partial summary judgment to require removal of violations outstanding against the Property for three years or for 70 days after Petitioner

certified to correction; to declare that N.Y. Multiple Dwelling Law §328.3 violates Petitioner's right to due process of law; and to enjoin Respondents from disseminating its computerized violation records to third parties for enforcement purposes. Respondents opposed said cross-motion.

The District Court (Judge John S. Martin Jr.) treated Respondents' motion as one for summary judgment. By Memorandum Opinion and Order dated August 19, 1994, the District Court granted Respondents' motion, denying or dismissing all of Petitioner's claims, and denying Petitioner's cross-motion for partial summary judgment (App. B. 4a-29a and App. C. 30a-31a).

The Second Circuit Court of Appeals, by decision filed May 8, 1995, affirmed the decision of the District Court without separate opinion (App. A. 1a-3a). On May 22, 1995, Petitioner petitioned the Second Circuit Court of Appeals for a rehearing *en banc*, which was denied by order issued June 28, 1995 (App. D. 32a-33a).

C. District Court Jurisdiction

The District Court had jurisdiction based upon federal questions raised in the Complaint which authorize suit under 28 U.S.C. §§1331, 1343, 2201 and 2202. The District Court had pendant jurisdiction as to causes of action not covered by federal question jurisdiction because these causes comprise different grounds for the federal causes of action or are so intertwined with the federal claims as to form a single case.

REASONS FOR GRANTING THE WRIT

I. THE DETERMINATIONS OF THE COURT BELOW ON IMPORTANT ISSUES CONCERNING MUNICIPAL REGULATION OF REAL PROPERTY CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. *Connally v. General Const. Co.* and *Yick Wo v. Hopkins* Preclude Selective Enforcement Of Vague Housing Maintenance Standards.

The vague standards of HMC §27-2005 permit HPD inspectors to report violations for virtually any condition from the most insignificant defect to a major structural flaw. The vagueness of these standards is compounded by the vague language of many violations and by HPD's refusal to permit owners to attend inspections or discuss violations with the inspectors who report them. Petitioner does not know what many of the Violations require, and different HPD inspectors or a Court may interpret the same Violation to require different work. This lack of clearly-defined standards denies owners the reasonable opportunity to act lawfully and facilitates the arbitrary and discriminatory enforcement precluded by *Connally v. General Construction Co.*, 269 U.S. 385, 390-393 (1926), and *Yick Wo v. Hopkins*, 118 U.S. 356, 372-374 (1886).

HPD's selective inspections of older rent-regulated buildings and the resulting disproportionate imposition of violations are not rationally-related to the goal of maintaining sound housing. Instead, they make it impossible for owners of such properties to operate profitably and lead to property abandonment.

B. The Decision Below Authorizes Regulatory Searches Which *Camara v. Municipal Court* and *See v. City of Seattle* Preclude.

Camara v. Municipal Court, 387 U.S. 523 (1967), and *See v. City of Seattle*, 387 U.S. 541 (1967), establish relevant parameters for building inspections. They permit warrantless inspections only in event of an emergency and authorize warrants only upon probable cause or as part of a generally-applicable inspection program. Inspecting building conditions at the request of a person in possession is also unobjectionable in most cases, as the references to "complainants" in HMC §§27-2115(f)(2) and (4) suggest. See also *U.S. v. Buettner-Janusch*, 646 F.2d 759 (2d Cir.), *cert. den.*, 454 U.S. 830 (1981).

However, none of the foregoing authorities permit inspection of selected properties on the initiative of a government agency without probable cause for the purpose of uncovering wrongdoing. Nonetheless, the decision below endorses selective inspections to find HMC violations (App. B. 21a).

When HPD inspectors arrive at the Property for unsolicited inspections, demanding that tenants or the building superintendent provide access, applicable precedents do not justify treating acquiescence to such demands as consent for purposes of the owner's Fourth Amendment protections.

C. The Decision Below Is Inconsistent With *Armstrong v. Manzo* In Enabling A Municipal Agency To Prosecute Violations Without Limitation Of Time.

Under the decision below, daily fines will continue to accumulate against the Property and Petitioner will continue to be subject to criminal prosecution until some indeterminate time in the future when HPD may decide to bring enforcement proceedings.

With exceptions not here relevant, CPLR §214.2 bars proceedings to enforce liabilities and penalties created or imposed by statute unless commenced within three years. CPLR §201 makes this bar binding on Respondents, and it applies to penalties under the HMC. *Brady v. Rudin Management Co.*, 13 A.D.2d 80, 83, 213 N.Y.S.2d 233, 236 (1st Dept. 1961), *reversed on other grounds*, 11 N.Y.2d 681, 225 N.Y.S.2d 757 (1962).

HMC §27-2115(f)(3) establishes an internal statute of limitations as well. HPD's failure to provide reasons when it sets aside owner certifications of correction under said Section makes its refusal to remove owner-certified violations invalid as a matter of law. *Kelly v. Railroad Retirement Bd.*, 625 F.2d 486, 490 (3rd Cir. 1980).

Respondents are thwarting the foregoing statutory bars on enforcement and the equitable bar of *laches* by failing to remove violations of record after passage of time has rendered them unenforceable. By subjecting Petitioner to enforcement proceedings without limit of time as penalties mount and defenses fade, Respondents are also violating Petitioner's due process protection

against untimely prosecution. *Armstrong v. Manzo*, 380 U.S. 545, 551-552 (1965).

D. The Decision Below Conflicts With *Ex Parte Young* and *Steffel v. Thompson* In Authorizing Accumulation Of Excessive Daily Fines And Criminal Penalties Without Permitting Any Federal Court Challenge To Their Constitutionality.

Most of the Violations never existed or were corrected years ago. While some would be cause for concern if they had in fact continued over the years, the accrual of daily fines and threat of criminal sanctions for years on end on the assumption that Petitioner has not corrected the conditions is not a rational response. For Violations for harmless conditions not affecting habitability, the accrual of such fines and penalties is even more absurd.

Nonetheless, under the decision below, HMC fines for the Violations will continue to accrue in perpetuity at several multiples of gross property income despite HPD's denial that it intends to enforce them. These fines and penalties are "excessive" for Eighth Amendment purposes because they are more than is reasonable, proper and just.

The decision below, relying on *U.S. v. Hooker Chemical & Plastics Corp.*, 748 F.Supp 67, 80 (W.D.N.Y. 1990), ruled that Petitioner cannot challenge these excessive fines and penalties because HPD has not commenced legal proceedings to enforce them and because Petitioner has the power to "remedy" the Violations and thereby avoid the fines (App. B. 25a). But unlike *Hooker*, the excessive

fines here are not fixed in time or amount and there is no pending litigation to determine them. Petitioner brought this proceeding precisely because Petitioner lacked power to remove the Violations from HPD's records.

Accruing crushing daily fines and criminal penalties while providing no reasonable way to challenge them is an abuse of government power which violates the Eighth Amendment. Under *Steffel v. Thompson*, 415 U.S. 452, 475 (1974), and *Ex Parte Young*, 209 U.S. 123, 144-150, 163-165 (1908), Petitioner can challenge these sanctions in federal court prior to prosecution therefor.

E. The Decision Below Endorses Dissemination Of Government Records For Use In Enforcement Proceedings Which Do Not Meet The Due Process Standards Of *Goldberg v. Kelly*.

The record amply demonstrates that HPD's records are incomplete, inaccurate, and slanderous. Nonetheless, the decision below endorses HPD's dissemination of its computerized violation records to third parties for use as *prima facie* evidence in proceedings to sanction Petitioner (App. B. 19a-20a).

Since N.Y. Multiple Dwelling Law §328.3 presumes that HPD's records are accurate, Petitioner must maintain voluminous rebuttal evidence for submission to the Housing Court or the DHCR whenever HPD's records are at issue. Since HPD's records are deemed accurate, HPD inspectors and other HPD personnel do not testify and are not available for cross-examination as to the meaning and accuracy of these records in Housing Court or DHCR

proceedings, depriving Petitioner of the fair hearing required by *Goldberg v. Kelly*, 397 U.S. 254, 269-270 (1970).

F. The Decision Below Conflicts With *Kaiser v. Aetna* In Burdening Petitioner With Liabilities That Constitute A "Taking" Of The Property.

For Respondents to single out the Property for unsolicited inspections, to report and continue violations under the procedures currently in effect, and to accrue daily fines and criminal penalties *ad infinitum* to be used, if collected, to pay for City housing programs, is a "taking" of the Property under both the "just and reasonable return" standard and the "economically viable use" standard. These practices threaten to extinguish retroactively all value and revenue from the Property and render it an uncompensated burden to Petitioner. This threat is not hypothetical or speculative but real and continuing.

The District Court did not focus on the comprehensive nature of Petitioner's "takings" claim, treating it as relating solely to doing work to correct the current Violations, not to the pervasive burden of coping with HMC provisions and Respondents' practices.

It is not premature to determine Petitioner's claims just because HPD has not yet brought a legal proceeding to enforce the statutory penalties or because Petitioner has not availed of inadequate and risky state remedies. As long as the Violations remain of record and HPD is free to continue its present enforcement practices, the uncertainty of operating under the continuing threat of unwarranted inspections, confiscatory fines, and criminal

penalties harms Petitioner and takes all value from the Property.

The decision of the Court below leaves property owners unprotected against such harm because of the theoretical possibilities that HPD would never bring enforcement proceedings or that the property owner could rebut HPD's computerized records. The decision leaves Petitioner in limbo as daily fines accrue and Petitioner's ability to rebut legal presumptions of guilt becomes ever more remote. In this proceeding Petitioner is seeking either to obtain declaratory and injunctive relief which will protect Petitioner against this harm or to surrender the Property for whatever compensation the Court determines payable for the taking thereof.

Instead of summarily denying Petitioner's takings claim, the Court should have considered whether the Property can fairly be subjected to the selective surveillance, unworkable procedures, and unlimited accumulation of civil fines and criminal penalties without constituting a taking of all economic viability therefrom. *Kaiser Aetna v. United States*, 444 U.S. 164, 174-175 (1979).

II. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER IN THIS CASE BECAUSE THE COURTS BELOW HAVE DEPRIVED PETITIONER OF A FAIR HEARING ON PETITIONER'S FEDERAL CLAIMS IN DISREGARD OF THIS COURT'S RULINGS.

A. *Patsy v. Florida Board of Regents* and *Monroe v. Pape* Permit Petitioner To Bring Due Process Claims In Federal Court Irrespective Of State Remedies.

HPD's procedures make it impossible for Petitioner to comply with the HMC and serve no legitimate public purpose. As a result of these procedures, violations and fines have accumulated against the Property without regard to its actual condition or to Petitioner's wrongdoing.

The decision below precludes Petitioner from raising due process objections in federal court because the Court deems state administrative and legal remedies adequate. The Court's analysis in this respect doesn't advert to *Patsy v. Florida Board of Regents*, 457 U.S. 496, 500-501 (1982), or *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Nor does the Court distinguish *Kraebel v. Dept. of Housing Pres. & Dev.*, 959 F.2d 395, 403-404 (2d Cir.), *cert. den.*, ___ U.S. ___, 113 S.Ct. 326 (1992), a case involving the same parties in the same forum on the same issue of federal jurisdiction, which held that federal courts have jurisdiction over due process claims notwithstanding the existence of state remedies. The Courts' failure to follow these rulings is puzzling and disturbing.

B. The Decision Below Relegates Petitioner To State Remedies Which Are Inadequate To Determine Federal Claims And Do Not Meet This Court's Standards For Fair Hearings.

State remedies for Petitioner's claims are conjectural, unreasonably risky, and unlikely to address federal issues.

There are no state administrative remedies with respect to the Violations. Interviews with HPD office personnel unfamiliar with the Property and without authority to remove violations is not a remedy for improper violations but an exercise in futility.

HPD's DIR Procedure is nothing but an HPD inspection costing owners $300. It does not entail consideration of any defense to a violation other than the inspector's perception that it is corrected at the time. Use of the DIR Procedure creates a self-perpetuating cycle of inspections and fees which is less a remedy for improper violations than a prescription for increased HPD surveillance of a property and unwarranted interference in building operations.

The decision below leaves Petitioner the sole recourse of bringing a proceeding to remove the Violations in New York City Housing Part under HMC §27-2117(b). Such a proceeding would subject Petitioner to the risk that HPD or the Court itself would attempt to collect accrued fines and impose criminal sanctions for the Violations.

In 1972 the Housing Part to enforce HMC Violations was established under N.Y. Civ. Court Act §110. Prior to

that time, HMC violations were enforced primarily by criminal prosecution. N.Y. Civ. Court Act §110(c) and the Legislative Findings justifying the new enforcement mechanism (App. I. 56a-58a) authorize and encourage Housing Part judges to act as co-prosecutors in enforcing the HMC, to recommend or employ any other legal remedy, program, procedure or sanction to enforce housing standards, and to impose more onerous fines and penalties than the criminal justice system would permit and without the legal protections to owners which the criminal justice system would afford.

Such proceedings are in essence criminal under *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and *Camara v. Municipal Court*, 387 U.S. at 531, and due process requires strict protections.

But New York law and practice with respect to HMC violations deny the most basic due process protections. Rather than protect owners, the statutes create legal presumptions of guilt that owners must disprove. HMC §27-2115(b) presumes that HPD has duly served NOVs on the owner. HMC §27-2115(f)(7) presumes that the owner has not corrected a violation if a certificate of correction is not filed. Multiple Dwelling Law §328.3 presumes that HPD's computerized records are accurate.

HPD can bring charges against owners in Housing Part proceedings upon five days' notice based on HPD's computerized records under N.Y. Civ. Court Act §110(a)(9). Owners cannot confront HPD inspectors or other HPD personnel in person or cross-examine them. Despite these impediments and despite Petitioner's representations that passage of time has rendered proof

on Petitioner's behalf increasingly unavailable, the decision below finds that Housing Part proceedings would provide Petitioner with a meaningful opportunity to prove any defenses and counterclaims under HMC §§27-2116(b) and (c). (App. B. 14a-18a and FN 6).

Housing Part judges are appointed by the Chief Administrative Judge of the New York City Civil Court and are not subject to normal state judicial oversight. Petitioner's experience of improper procedures in a prior proceeding in the Housing Part exemplifies the risk to owners in this forum.

A Housing Part proceeding would not provide due process or be meaningful in time or manner under the standards of *Goldberg v. Kelly*, 397 U.S. at 269-270, or *Armstrong v. Manzo*, 380 U.S. at 551-552. Instead, this legal "remedy" threatens Petitioner with massive fines and imprisonment under procedures that are an assault on fundamental protections of our legal order. Such a state remedy does not satisfy due process. *Ex Parte Young*, 209 U.S. at 144-150.

In any event, Petitioner has learned that this purported legal remedy for improper Violations may not exist and that Petitioner would have to break new legal ground to even get such a proceeding before the Housing Part. A remedy which exists in the statutes but not in the real world is not a proper vehicle for redress of due process violations.

The District Court also found that Petitioner could bring federal claims with respect to the Violations in a proceeding under Art. 78 of the N.Y. Civ. Pract. Law and

Rules (CPLR) entitled Proceeding Against Body Or Officer. But this is highly conjectural since vesting of jurisdiction over HMC violations in the Housing Part of Civil Court. Respondents have never argued that Art. 78 relief was available to Petitioner and did not endorse this idea on appeal. All of the cases cited by the Court below to support Art. 78 relief (App. B. 14a-15a) were brought in State Supreme Court, not Housing Court, and they all involved rent regulations, not HMC violations.

C. The Decision Below Conflicts With *Conley v. Gibson*, *Adickes v. Kress*, and *Anderson v. Liberty Lobby* By Giving Insufficient Weight To Petitioner's Allegations And Supporting Evidence, By Giving Presumptive Weight To Respondents' Unsupported Assertions, And By Determining Disputed Facts In Respondents' Favor.

Under the standards of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), and *Adickes v. Kress*, 398 U.S. at 157-161, the Respondents did not even begin to meet their legal burden for either dismissal or summary judgment. The Court's selective reading of the record to support Respondents' motions is diametrically opposed to this Court's rulings on burden of proof and should not be permitted to stand.

The opinion below is replete with findings that contradict Petitioner's allegations and supporting proof and are instead based on the Respondents' unsubstantiated assertions.

Among findings in the opinion which Petitioner disputed or refuted with competent evidence are that all HPD inspections of the Property were authorized by tenants or were court-ordered; that Petitioner provided no evidence of malicious intent in HPD inspections; that HPD provided Petitioner with NOVs for all of the Violations; that Petitioner has the power to remedy the Violations and remove them by certification; that HPD's certification procedures are reasonable; that Petitioner did not avail of HPD's certification requirements to correct the Violations; that Petitioner wants the Court to invalidate and enjoin enforcement of all of the Violations; that Petitioner can bring a Housing Part proceeding to remove the Violations; that Petitioner provided no supporting evidence for due process objections to Housing Part proceedings; and that a Housing Part proceeding would provide Petitioner with a meaningful and adequate opportunity to contest the Violations.

If the Complaint had raised no federal claims, the Court could have dismissed it on the pleadings. By ruling out this option, the Court implicitly acknowledged that the Complaint did raise federal claims. Summary judgment was precluded if there was a genuine issue as to any material fact which would support any of Petitioner's claims.

A review of the record leads to the inescapable conclusion that there were such issues. There has been no discovery and no hearing in the case. No agreement on material facts supports Respondents' motion. Respondents did not submit any of their administrative records. The only documentary evidence they submitted were the DIR Procedure regulations and memo (App. K.

61a-63a and App. L. 64a-66a). The sole evidence supporting Respondents' motion were affidavits of Respondents' attorney and of an Assistant Commissioner employed by HPD since June 1992, after all of the Violations were reported and most other significant events occurred. These affidavits were inadmissible as to most material facts because the facts were not within the personal knowledge of the affiants. Petitioner controverted most material facts alleged by Respondents based on personal knowledge and documentary evidence. As to other facts, documentary proof is within Respondents' control and not available to Petitioner until discovery commences.

Nonetheless, the District Court repeatedly determined disputed facts in Respondent's favor. Some of the Court's findings on disputed facts compromise or negate claims and defenses the Court apparently expects Petitioner to raise in state court proceedings. In addition, the summary judgment determination could bar claims in state court litigation which the Court addressed partially or not at all. Indeed, the decision leaves confusion as to which, if any, of Petitioner's claims a state court might find remaining either as defenses to enforcement proceedings or as grounds for affirmative proceedings to remove the Violations. By deciding issues of substance without the proper factual foundation, the decision below not only errs as a matter of law under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-250 (1986), and *Adickes v. Kress*, 398 U.S. at 157-161, but also compromises all of Petitioner's claims and defenses with respect to HMC violations.

The record in support of Petitioner's cross-motion for partial summary judgment contrasts markedly to the record in support of Respondents' motions. There is no genuine issue as to any material fact supporting Petitioner's cross-motion. All material facts were either agreed by the parties or established by documentary evidence. Respondents have not submitted any competent evidence in rebuttal. Thus, viewing the evidence most favorably to Respondents, Petitioner met the burden on Petitioner's cross-motion for partial summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. at 251-252.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the opinion and judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

BARBARA KRAEBEL D/B/A
Barklee Realty Company
Petitioner *pro se*
60 East 42nd Street – #1146
New York, New York 10165
Telephone: (212) 831-1012

August 7, 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

FILED MAY 8, 1995

GEORGE LANGE III, CLERK
No. 94-7996

JMcL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City and County of New York, on the 8th day of May one thousand nine hundred and ninety-five.

Present

HONORABLE JOSEPH M. McLAUGHLIN,
HONORABLE JOSE A. CABRANES,
Circuit Judges,
HONORABLE MILTON POLLACK*,
District Judge.

---

* Of the United States District Court for the Southern District of New York, sitting by designation.

BARBARA KRAEBEL Doing Business As
BARKLEE REALTY COMPANY
Plaintiff-Appellant,

- v.-

FELICE MICHETTI, As Commissioner of
The New York City Department of
Housing Preservation and Development,
and NEW YORK CITY DEPARTMENT OF
HOUSING PRESERVATION AND DEVELOPMENT,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York (Martin, J.).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

Barbara Kraebel, an attorney proceeding pro se, appeals from a decision of the United States District Court for the Southern District of New York (Martin, J.), granting defendants' motion for summary judgment.

We have reviewed Kraebel's claims and find them without merit. We affirm substantially for the reasons set forth in the district court's comprehensive opinion. See Kraebel v. Michetti, No. 93-4596 (JSM), 1994 WL 455468 (S.D.N.Y. Aug. 22, 1994).

The decision of the district court is AFFIRMED.

/s/ Joseph M. McLaughlin
HON. JOSEPH M. McLAUGHLIN,

/s/ Jose A. Cabranes
HON. JOSE A. CABRANES,
Circuit Judges,

/s/ Milton Pollack
HON. MILTON POLLACK,
District Judge.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE USED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

APPENDIX B

#93 Civ. 4596 (JSM)

MEMORANDUM OPINION
AND ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BARBARA KRAEBEL D/B/A
BARKLEE REALTY COMPANY,

Plaintiff,

v.

FELICE MICHETTI, COMMISSIONER OF
THE NEW YORK CITY DEPT. OF HOUSING
PRESERVATION AND DEVELOPMENT and
THE NEW YORK CITY DEPT. OF HOUSING
PRESERVATION AND DEVELOPMENT,

Defendants.

JOHN S. MARTIN, JR., District Judge:

BACKGROUND AND FACTS

This litigation is the product of plaintiff's frustration with the regulatory demands of the rental housing industry. Unable to resolve her complaints with New York City's housing agency, and either unable or unwilling to cure the

violations from her property through appropriate state procedures, plaintiff has sought relief in the federal courts.

Plaintiff, who is proceeding pro se, is the owner of a sixteen unit residential property located at 205 West 147th Street in Manhattan (the "Property" or the "Building"), which she purchased in 1984 for $35,000. The Building, which has many low-income tenants, is subject to rent regulations under the Rent Control and Rent Stabilization programs administered by the New York State Division of Housing and Community Renewal ("DHCR"). The defendant New York City Department of Housing Preservation and Development ("HPD") is responsible for inspecting residential premises and ensuring compliance with the provisions of the Housing Maintenance Code ("HMC"), New York City Administrative Code § 27-2000 et seq., which regulated the maintenance and preservation of residential buildings in New York City.

After a series of inspections of plaintiff's property, defendants identified thirty-one violations of the HMC and notified plaintiff of those violations pursuant to § 27-2115(b)

of the HMC.[1] Under HMC § 27-2115(a), violations are classified as "non-hazardous", or Class A Violations, for which the maximum penalty if $50, "hazardous", or Class B violations, for which the maximum penalty is $100 plus $10 per day, and "immediately hazardous", or Class C violations, for which the maximum penalty is $150 plus $125 per day. There are currently eight Class A violations, twenty-two Class B violations, and one Class C violation outstanding on the Property. Although the violations carry fines and penalties, these penalties are not self-executing. The only way HPD may enforce the violations and collect the fines is by bringing an enforcement action in Housing Court pursuant to HMC § 27-2116.[2]

---

[1] Section 27-2115(b) of the HMC provides in relevant part:

> The department shall serve a notice of violation upon the owner, his or her agent or other person responsible for its correction. The notice shall identify the condition constituting the violation, the provision of law applicable thereto, the department's order number, the classification of the violation according to its degree of hazard, the time for certifying the correction of such violation, and the amount of the possible penalty.

Throughout this opinion, the Court will refer to notices of violation pursuant to this section as "NOV's".

[2] "The department may bring an action in the housing part of the New York City Civil Court for the recovery of civil penalties, together with costs and disbursements." HMC § 27-2116.

On July 7, 1993, plaintiff brought this action against defendants pursuant to 42 U.S.C. § 1983, alleging, inter alia, that defendants have unlawfully and unconstitutionally enforced various housing regulations against her and that certain provisions of the HMC are unconstitutional. The lengthy complaint contains eleven causes of action, many of which raise no constitutional claims whatsoever. All but one of these claims essentially seek the same relief: plaintiff wants the Court to invalidate and enjoin the enforcement of all housing code violations reported on the Property.

Currently before this Court is defendants' motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), or in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56(c). Plaintiff has cross-moved for partial summary judgment on three of her claims. Because the Court has considered the affidavits and other documentary evidence submitted by the parties, it will treat the motion as one for summary judgment.

DISCUSSION

Summary Judgment

Summary judgment is proper when there is no genuine issue of material fact and, based upon facts not in dispute, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548 (1986). The court's role on a motion for summary judgment is not to decide disputed issues of fact but only to determine whether there is a genuine issue to be tried. Rattner v. Netburn, 930 F.2d 204, 209 (2d Cir. 1991). The court must resolve all ambiguities and draw all factual inferences in favor of the nonmoving party. Rattner, 930 F.2d at 209 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505 (1986)).

Nevertheless, in order to defeat a motion for summary judgment, the factual dispute must be both material and genuine. In order for a dispute to be genuine, the court must be satisfied that evidence exists upon which the finder of fact could reasonably find for the party opposing the motion. Anderson v. Liberty Lobby, 477 U.S. 243, 248-52, 106 S. Ct. 2505, 2510-12 (1986). Summary judgment may be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." Celotex, 477 U.S. at 322, 106 S. Ct. at 2552. "Moreover, in opposing a motion, a party may not rest upon mere conclusory allegations or denials." Eastway Const. Corp. v. City of New York, 762 F.2d 243, 249 (2d Cir. 1985).

42 U.S.C. § 1983 provides a remedy to those who, as a result of state action, suffer a deprivation of "rights, privileges or immunities secured by the Constitution and laws of the United States." 42 U.S.C.A. § 1983 (West 1981). Thus, in any action brought pursuant to § 1983,

> the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Parratt v. Taylor, 451 U.S. 527, 535, 101 S. Ct. 1908, 1913 (1981).

There is no question that the conduct plaintiff alleges satisfies the "under color of state law" requirement. Defendants do not dispute that they are state agencies or state employees who were acting in the course of administering and enforcing state law. The question then becomes whether plaintiff has established any genuine issue

of material fact as to whether or not defendants' conduct constituted a deprivation of some right secured by federal statute or the United States Constitution. The Court will now proceed to examine each of plaintiff's claims.

Due Process Claims

The Allegations

Several of plaintiff's allegations in the complaint raise due process claims. The main argument plaintiff makes in several different forms in her Sixth Cause of Action is that defendants' enforcement procedures do not provide adequate mechanisms for clearing an owner's record of violations which are either erroneous or have been corrected. In a related claim, plaintiff also challenges HPD's policy of refusing to permit landlords to attend inspections, arguing that such a policy denies owners adequate notice of what action is required to remedy the violations and prevents owners from challenging erroneously reported violations.

In her Seventh Cause of Action, plaintiff alleges that HMC § 27-2115(f)(1), which governs the procedure by which landlords may certify that specific violations are corrected, violates due process because it does not permit partial certification of a class of violations, thereby subjecting an owner to fines if she is not able to certify that all of the violations in the same class have been corrected within the given time period.

In her Ninth Cause of Action, plaintiff alleges that Section 328.3 of the Multiple Dwelling Law, which authorizes HPD to disseminate records of violations to third parties and provides that such records constitute prima facie evidence of code violations, violates her due process rights because it creates a presumption that she is in violation of the HMC.

Where is the Deprivation?

As a threshold matter, plaintiff's claim does not appear to allege any deprivation of a federally-protected right. Although the complaint alleges violations of due process without much elaboration, plaintiff's due process claims appear to be based upon a procedural due process theory. Nothing in plaintiff's complaint, affidavits or other evidence submitted indicates that plaintiff has been deprived of any property right.[3] To have a property interest, a person must have a "legitimate claim of entitlement." Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972). "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Roth, 408 U.S. at 577, 92 S. Ct. at 2709.

If plaintiff's numerous references to the Fourteenth Amendment and due process are meant to suggest that defendants' actions in identifying violations of the HMC amount to a deprivation of plaintiff's property without due process, such a claim is inadequate as a matter of law. The Court cannot conceive of how defendants' mere identification and reporting of violations, without taking actions to impose a penalty, could amount to a deprivation of plaintiff's property. Plaintiff does not have any entitlement to an unblemished housing code record, and an unblemished record is all that defendants have arguably deprived her of at this point in time.

---

[3] There is no question that the only possibly applicable constitutional right at issue in this case is plaintiff's property right, as opposed to her life or liberty interests.

Even if plaintiff's complaint could be construed to allege that she has been deprived of the "right" to have HPD clear her records of erroneous or unenforced violations, the Court does not find that such a property right exists. See Eastway, 762 F.2d at 250 (rejecting developer's argument that it had property interest in having City rule upon application for project approval and financing in timely and impartial manner). The mere existence of state procedures for clearing up erroneous or obsolete violations does not give rise to an independent property interest protected by the Fourteenth Amendment. See Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 58-59 (2d Cir. 1985). Accordingly, summary judgment on the due process claims is appropriate on this basis alone.

What Process is Due?

Assuming, arguendo, that plaintiff has adequately alleged a deprivation of property, plaintiff's due process claims are still inadequate as a matter of law. Despite plaintiff's assertion to the contrary, the existence of state remedies is highly relevant to an action under § 1983 for a violation of procedural due process. "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." Zinermon v. Burch, 494 U.S. 113, 125, 110 S. Ct. 975, 983 (1990) (emphasis in original). The constitutional violation actionable under § 1983 is not complete "unless and until the State fails to provide due process." Id. Therefore, to determine whether a constitutional violation has occurred, the Court must analyze those processes defendants have provided, and whether they are constitutionally adequate. Id.

What Has the State Provided?

New York City has three different mechanism whereby owners may challenge violations reported by HPD and have them removed from their record before any final finding of liability is made and any deprivation of property occurs.

1. Certification of Correction

HPD offers property owners a certification procedure for correcting violations and clearing their records within days of receiving a NOV. Pursuant to HMC § 27-2115(b), every NOV advises the building owner that the department, upon request, will "confer with the owner or her representative concerning the nature of the work to be done to insure compliance and the methods of financing such work." HMC § 27-2115(b). To cure a violation, an owner must perform the necessary repairs and certify that the repairs have been completed. See HMC § 27-2115(f). HPD requires that owners certify that particular violations have been corrected by circling the violation on the original NOV form, noting the date of correction and initialing the appropriate boxes. The certification must also be signed before a Notary Public. NOV's are generated according to class of violation and each class of violation carries with it a time period within which violations must be corrected. Therefore, certification of correction of particular classes of violations must be completed within a specified period of time that incorporates the statutory time period for correction.[4] If an owner is having trouble correcting some but not all of the violations

[4] An owner has six days to certify Class C violations, forty-four days to certify a Class B violation, and 104 days to certify Class A violations.

listed on an NOV, she may request an extension of the applicable deadline upon showing that

> prompt action to correct the violation has been taken but that full correction cannot be completed within the time provided because of technical difficulties, inability to obtain the necessary materials, funds, or labor, or inability to gain access to the dwelling unit wherein the violation occurs or such other part of the building as may be necessary to make the required repair.

HMC § 27-2115(c).[5]

Pursuant to HMC § 27-2115(f)(3), upon receipt of an owner's certification, HPD has seventy days in which to reinspect the premises. If no inspection is performed within this time period, the violation is deemed corrected as a matter of law. If HPD does reinspect and finds the violation has not been cured, it must notify the owner that the Department deems such certification to be false. An owner has the right to apply to the housing court for a determination that the violation was in fact corrected and that HPD's finding of false certification was unjustified. See HMC § 27-2115(f)(5).

2. The Dismissal Request Inspection Program

If an owner is unable to correct the violations within the requisite time period for certification, the City provides

---

[5] Thus, plaintiff's allegation in Count Seven of the complaint that the certification process is inadequate because it does not allow partial certification of violations is incorrect as a matter of law. See also Affidavit of Lawrence Schatt in Support of Motion to Dismiss and Motion for Summary Judgment, ¶¶ 24-25 ("Schatt Affidavit").

another mechanism for removing the violations through the Dismissal Request Inspection Program ("DIR"), 28 R.C.N.Y Ch. 9 (1991). The purpose of the DIR is to provide owners with a "mechanism for obtaining reinspection of their properties for the purpose of removing Code violations from the records of the Department." 28 R.C.N.Y. § 9-01. Upon payment of a $300 fee, an owner may have an HPD inspector come to the property and reinspect the violations to determine whether or not they have been cured. See 28 R.C.N.Y. §§ 9-03, 9-04.

3. Action in Housing Court or Other Civil Court

Finally, if an owner believes she has valid defenses to violations reported, or that HPD has erroneously identified violations, she may bring an action pursuant to HMC § 27-2117(b), which provides: "Nothing in this article shall prevent an owner from contesting the finding of a violation by the department, in advance of the department's action for the collection of penalties in the housing part of the civil court of the City of New York or by any other means provided by law."[6] Although plaintiff contends that such an action is unheard of and without precedent, landlords have frequently brought actions pursuant to Article 78 of the CPLR, N.Y. Civ. Prac. L. & R. § 7801, challenging determinations and actions taken by New York's housing agencies. See, e.g., 258 Riverside Drive Co. v. New York State Div. of Housing & Comm. Renewal, 569 N.Y.S.2d 18 (A.D. 1st Dept. 1991); Albert v. Eimicke, 542 N.Y.S.2d 770 (A.D. 2d Dept. 1989); Tenant's Advisory Committee of Sky View Towers v. Starr,

---

[6] Of course, if HPD does bring an enforcement action, an owner has several defenses to liability and may mitigate the penalty due on specific grounds provided for in the HMC. See HMC § 27-2116(b).

382 N.Y.S.2d 605 (Sup. Ct.), aff'd, 387 N.Y.S.2d 297 (A.D. 2nd Dept. 1976), aff'd 399 N.Y.S.2d 211 (1977).

Are the State Procedures Constitutionally Adequate?

Having determined that the state provides several procedures for clearing violations from an owner's record, the Court must determine whether those procedures satisfy due process. "The fundamental requirement of due process is the opportunity to be heard and it is an opportunity which must be granted at a meaningful time and in a meaningful manner." Parratt v. Taylor, 451 U.S. at 540, 101 S. Ct. at 1915 (internal quotations omitted). Ordinarily, the Supreme Court has found that due process requires "some kind of hearing . . . at some time before a State finally deprives a person of his property interests." Id.

The procedures New York City provides for clearing erroneous or obsolete violations from an owner's record more than adequately provide plaintiff with several meaningful opportunities to contest the findings of violation prior to any deprivation of property. Under the City's procedures, an owner has at least two opportunities to clear her record without having to resort to a full hearing. If violations have not been removed by means of the certification procedure or the DIR program, the owner still has the opportunity for a full hearing on the merits at either her own initiative or HPD's.

In Dept. of Housing Preservation & Development of the City of New York v. Debona, 476 N.Y.S.2d 190 (A.D. 2d Dept. 1984), the court reviewed a procedural framework similar to those currently being challenged and found that the procedures satisfied the requirements of due process:

> Although civil penalties for the violation run from the date the notice is affixed to the certificate of

> inspection visits and there is a presumption of a continuing violation, penalties cannot be collected or otherwise enforced, until a judicial proceeding is brought. At this proceeding, the owner may negate the existence of any violation, rebut the presumption of a continuing violation, or otherwise present a defense. Thus the owner is afforded a full hearing on the merits prior to the deprivation of any property rights.

476 N.Y.S.2d at 192 (emphasis added)(internal citations omitted). Like the regulation in Debona, the City's procedures for clearing violations afford plaintiff a full opportunity to have a predeprivation hearing on the merits.

Further, the fact that such a hearing does not automatically occur is of no constitutional consequence. "'Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of liability is adequate.'" Debona, 476 N.Y.S.2d at 192 (quoting Matter of 300 West 154th Street Realty Co. v. Dep't of Bldgs. of City of New York, 311 N.Y.S.2d 899 (1970).

Although plaintiff offers a multitude of complaints about the various requirements of the procedures available to her, none of them have any constitutional significance. There is nothing objectionable to either HPD's refusal to accept certifications which are not filed on the original NOV or which are not filed within the requisite time period or the imposition of a $300 fee for a DIR inspection.

> The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, or, in an appropriate case, filing fees. And the State certainly accords due process when it terminates a claim for

failure to comply with a reasonable procedural or evidentiary rule.

Logan v. Zimmerman Brush Co., 455 U.S. 422, 437, 102 S. Ct. 1148, 1158 (1982) (internal citations omitted).

Similarly, plaintiff's claims that the DIR procedure is inadequate because it subjects her to the risk of incurring new violations is wholly without merit. The whole point of this procedural framework is to ensure public safety through the most expeditious correction of code violations. The DIR and its $300 fee create a reasonable incentive to remedy the violations through the less costly and less intrusive certification procedure, yet provide an additional opportunity for building owners to clear up their record.

Plaintiff's arguments that the Housing Court option is inadequate are equally unavailing. Pointing to the hearsay evidence of a series of telephone conversations with Housing Court employees, plaintiff contends there is no available Housing Court proceeding which provides a remedy against erroneously reported violations. See Kraebel Affirmation in Opposition to Defendants' Motions to Dismiss and for Summary Judgment, March 15, 1994, ¶¶ 29-32. Plaintiff further asserts, without any supporting evidence, that her prior experience in Housing Court give her reason to doubt that such a proceeding would be conducted in accordance with due process. No reasonable factfinder could conclude that no opportunity to challenge HMC violations existed based on these bald assertions, given the undisputed existence of HMC § 27-2117(b) and the availability of an Article 78 proceeding. Plaintiff has therefore failed to meet her burden in opposing summary judgment on this claim.

Furthermore, plaintiff's contention that an action in Housing Court is not a viable option because it would subject her to the risk that HPD might initiate enforcement

proceedings in response, or that the Housing Court might act sua sponte to commence enforcement proceedings, fails for the same reason her argument about the DIR procedure fails. Plaintiff may promptly correct the violations through the certification procedure without running the risks associated with a housing court action. If she does not take remedial action promptly, however, and still wishes to challenge the violations, she must accept the risk of calling attention to the fact that she remains in violation of the HMC.

There is no dispute that plaintiff did not avail herself of any of these procedures or comply with the City's reasonable procedural requirements. Accordingly, there has been no denial of due process as a matter of law because the State has not yet deprived her of the process that is due. See Giglio v. Dunn, 732 F.2d 1133, 1134-35 (2d Cir.), cert. denied, 469 U.S. 932 (1984) (rejecting due process claim where teacher who claimed resignation was coerced had not availed himself of meaningful opportunity to challenge the resignation under state law procedure); Zinermon, 494 U.S. at 126, 110 S. Ct. at 983. Cf. Seril v. New York State Div. of Housing & Community Renewal, 613 N.Y.S.2d 157 (A.D. 1st Dept. 1994)(rejecting claim that agency's refusal to terminate finding of tenant harassment violated owner's constitutional rights where owner had option of correcting conditions that led to finding); Krax Perapatie Apanu Stu Krokodrilos Tus Platos, Ltd. v. N.Y.C Loft Bd., 550 N.Y.S.2d 629, 639 (A.D. 1st Dept. 1990)(no deprivation of constitutional rights where owner could seek termination of finding of harassment pursuant to agency procedures). Accordingly, the Due Process claims raised in the Sixth and Seventh causes of action in the complaint are hereby dismissed.

In her Ninth Cause of Action, plaintiff alleges that Section 328.3 of the Multiple Dwelling Law violates plaintiff's due process. Plaintiff alleges that HPD's records have been the basis for "Housing Court orders against plaintiff abating

rents at the Property, requiring correction of violations and potentially subjecting plaintiff to civil and criminal penalties for failing to correct such violations." Complaint ¶ 112, Exhibit A to Defendants' Affidavit in Support of Motion to Dismiss and for Summary Judgment ("Complaint"). Plaintiff contends that the dissemination of this information, which she contends is "full of erroneous and obsolete information which can be very damaging to owners", Complaint ¶ 115, and which is authorized by § 328.3, is evidence that defendants are administering the HMC with reckless disregard or deliberate indifference to plaintiff's due process rights.

Pursuant to Multiple Dwelling Law § 328.3, HPD provides access to its records of violations against the property to the Housing Court and those records constitute prima facie evidence of any matter contained in those records. See N.Y. Mult. Dwell. Law § 328.3 (McKinney Supp. 1994). The statute further provides that courts "shall take judicial notice thereof as if same were certified as true under the seal and signature of the commissioner of the department." Id.

Although plaintiff has submitted her own affidavit testimony to the effect that she has been subjected to rent abatements by the Housing Courts in two dispossess proceedings and that she has not yet obtained a ruling on her 1994-95 application for a maximum rent increase, see Kraebel Affirmation in Support of Motion for Partial Summary Judgment, Feb. 22, 1994, ¶¶ 38-40, plaintiff has not presented any evidence suggesting a denial of due process. The fact that § 328.3 establishes that HPD's records of violations constitute prima facie evidence, as opposed to conclusive evidence, of the existence of violations in no way denies plaintiff an opportunity to rebut the prima facie case by presenting her own evidence. Indeed, the form for certifying HMC violations in conjunction with an application for a rent increase from the DHCR provides a property owner with several opportunities to challenge HPD's records as either

erroneous or obsolete. See Kraebel Affirmation in Support of Motion for Partial Summary Judgment, Feb. 22, 1994, Exhibit F. An owner may also request that the DHCR waive particular violations upon submission of evidence that the owner has been unable to access the premises to make the required repairs, the violations are tenant-induced, or the violations have been corrected. Id. Thus, it is clear that there are meaningful opportunities for plaintiff to challenge the HPD records prior to any agency action of Housing Court decision affecting her property interests. Accordingly, summary judgment in favor of defendants is warranted as to this claim. Plaintiff's motion for partial summary judgment on this claim is denied.

Equal Protection Claims

In her Tenth Cause of Action, plaintiff alleges that defendants have singled her building out for inspection to harass her and that HPD does not inspect all other older buildings which plaintiff contends have similar violations. Plaintiff further alleges that HPD misuses its authority to harass private owners of low-income housing in order to drive them out of business and transfer their properties to HPD-favored landlords.

To the extent that these allegations raise an Equal Protection claim, they are inadequate as a matter of law. Plaintiff, as a private landlord subject to rent-control regulations, is not a member of a suspect class. See Kraebel v. New York City Dept. of Housing Preservation & Development, 959 F.2d 395, 402 (2d Cir.), cert. denied, 113 S. Ct. 326 (1992). Moreover, she has not alleged any fundamental right burdened by defendants' conduct in administering the HMC. See id. Therefore, the challenged actions will not be unlawful unless they are not "rationally related" to a legitimate government purpose. See Soberal-Perez v. Heckler, 717 F.2d 36, 41 (2d Cir. 1983), cert. denied,

466 U.S. 929 (1984); Pennell v. City of San Jose, 485 U.S. 1, 14, 108 S. Ct. 849, 859 (1988). See also Blecher v. Dept. of Housing Preservation and Development, 1994 WL 144376, *3 (S.D.N.Y. April 19, 1994) (dismissing equal protection claim by rental landlords).

Defendants are responsible for enforcing the HMC against 135,000 multiple dwellings in New York City. There are currently over three million outstanding violations recorded. See Schatt Affidavit ¶ 9. It would be both financially and physically impossible for defendants to inspect each and every building subject to the code and to bring enforcement actions in every case of a violation. Therefore, the Court can find nothing irrational in defendants' decision to enforce the code selectively, especially absent any evidence produced by plaintiff of any malicious intent on the part of defendants in inspecting her property.

In addition, plaintiff's Ninth Cause of Action alleges that Mult. Dwell. Law § 328.3 also violates her Equal Protection rights. The Court finds that the statute burdens no fundamental right and is rationally related to the legitimate government purpose of ensuring compliance with the HMC.

Accordingly, plaintiff's Equal Protection claims are dismissed.

Fourth Amendment Claims

In her Fourth and Sixth Causes of Action, plaintiff alleges that her Fourth Amendment right to be free from unreasonable searches was violated because inspections to her property were made without a warrant and without prior notice to her. Plaintiff further contends that on several occasions, unnamed agents of HPD attempted to inspect the premises but were turned away by the superintendent and that these "unsolicited" attempts somehow constituted

unreasonable searches. In response, defendants contend that all of the inspections of plaintiff's property were performed either at plaintiff's request, with the consent of a tenant or pursuant to a court order.[7]

Administrative searches, such as inspections of residential rental property by HPD, are subject to the Fourth Amendment's prohibition of unreasonable searches and seizures. See Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 534, 87 S. Ct. 1727, 1733 (1967); Stender v. City of Albany, 592 N.Y.S.2d 70, 72 (A.D. 3rd Dept. 1992), appeal dismissed, 599 N.Y.S.2d 805 (1993). Where a tenant has consented to an inspection by a housing inspector of the common areas of a building and the tenant's leased premises, the landlord's Fourth Amendment rights are not violated. See United States v. Buettner-Janusch, 646 F.2d 759, 765 (2d Cir.), cert. denied, 454 U.S. 830 (1981); People v. Sybil Holding Corp., 315 N.Y.S.2d 496, 500-501 (N.Y. Crim. Ct. 1970), aff'd, 334 N.Y.S.2d 810 (Sup. Ct. 1972); People v. Mosley, 272 N.Y.S.2d 493, 494 (A.D. 2d Dept. 1966).

Defendants assert that all of the searches to plaintiff's property were conducted either with the tenants' consent or pursuant to a court order, and therefore, plaintiff's claim should be dismissed. In his Affidavit in Support of the

---

[7] HMC § 27-2123(a) provides that "[a] judge of any civil court of competent jurisdiction may, upon appropriate application by the department supported by an affidavit or affirmation, issue an order directing that access be provided to an officer or inspector of [HPD] to any premises or part thereof, whenever an inspection of any premises or part thereof is required or authorized by any state or local law or regulation or entry to such area is necessary for correction of a condition violating such law or regulation."

Motion to Dismiss, Lawrence Schatt, an assistant commissioner at HPD responsible for code enforcement, states that in every instance the tenants provided access to the common areas or their individual apartments. Schatt Affidavit ¶ 22.

Plaintiff has not produced any evidence creating genuine issue of fact regarding whether or not the inspections were conducted with the consent of tenants or pursuant to court order. Plaintiff concedes that two inspections, performed on July 12, 1990 and April 28, 1992, were conducted pursuant to an order form the Housing Court conducting dispossess proceedings which plaintiff had brought against two tenants. See Kraebel Affirmation in Opposition to Defendants' Motions to Dismiss and for Summary Judgment, March 15, 1994, ¶ 5. Indeed, all that plaintiff asserts is that the remaining inspections were conducted out of her presence and without prior notice to her. See id. at ¶ 10; see also Plaintiff's 3(g) Statement ¶ 9. Neither of these statements, even if taken as true, creates a factual dispute as to whether the searches were conducted without the consent of the tenants.

As for the claim about unsolicited attempts to inspect the premises, even taking plaintiff's allegations as true, there is no indication that the inspectors actually inspected the Property on those occasions. Therefore, these allegations fail as a matter of law to establish a genuine factual dispute over whether or not a Fourth Amendment violation occurred because there is no evidence of any "search".

Accordingly, plaintiff's Fourth Amendment claims are dismissed.

Excessive Fines Clause Claims

Several of plaintiff's claims allege violations of the Excessive Fines Clause of the Eighth Amendment, which provides: "Excessive bail shall not be required not excessive fines imposed, nor cruel and unusual punishments inflicted."[8]

Plaintiff argues that several pieces of the HMC enforcement scheme violate the Excessive Fines Clause, although each claim is essentially a defense to code violations cloaked in constitutional garb. In her Seventh Cause of Action, plaintiff contends that the certification process authorized by HMC § 27-2115(f)(1) unconstitutionally subjects her to fines. In her Third Cause of Action, she contends that § 27-2115(b) of the HMC, which authorizes service of NOV's by mail, violates her rights by subjecting her to fines due to her failure to certify corrections within the time period allotted, a failure she contends is the result of not having received the NOV's in the mail. Finally, in her Eighth Cause of Action, plaintiff alleges that the "enormous fines" authorized by § 27-2115(a) of the HMC for violations reported against the property are totally disproportionate and do not serve a legitimate governmental purpose.

Plaintiff concedes that no fines have been imposed against the property and that no enforcement proceedings are pending against her. She also concedes that no liability for fines has been determined and no judgment has been awarded. Therefore, each of these claims is not ripe for review and insufficient as a matter of law. Merely being potentially subject to fines, without an actual finding of liability, is not enough to state a claim for an Eighth

---

[8] The Eighth Amendment is applicable to the states through the Fourteenth Amendment. Robinson v. State of California, 370 U.S. 660, 666, 82 S. Ct. 1417, 1420 (1962).

Amendment violation. See United States v. Hooker Chemical & Plastics Corp., 748 F. Supp. 67, 80 (W.D.N.Y. 1990). Moreover, even if plaintiff were in fact liable for the fines which have accrued due to the continuing violations on her property, there would be no violation of the Eighth Amendment where she has the power to remedy the violations and thereby avoid imposition of fines. See Seril v. N.Y. State Div. of Housing & Community Renewal, 613 N.Y.S.2d 157, 157 (A.D. 1st Dept. 1994)(rejecting Eighth Amendment challenge to agency's refusal to lift finding of tenant harassment where owner had option to take actions leading to termination of finding); Krax Perapatie Apanu Stu Krokodrilos Tus Platos, Ltd. v. N.Y.C. Loft Bd., 550 N.Y.S.2d 629, 630 (A.D. 1st Dept. 1990)(same). Accordingly, plaintiff's Eighth Amendment claims are dismissed.

Takings Clause Claim

In her Tenth Cause of Action, plaintiff alleges that HPD has violated her Fifth Amendment rights through a regulatory taking of her property. [9] Plaintiff argues that requiring her to correct all the violations will "take all income and monetary value from the property". Complaint ¶ 158. Plaintiff seeks damages in the amount of $560,000 to compensate her for the taking and also requests the Court to direct HPD to take title of the property in satisfaction of all of plaintiff's obligations under the HMC.

---

[9] The Fifth Amendment provides in relevant part: "Nor shall private property be taken for public use, without just compensation." The Fifth Amendment's prohibition applies to the states through the Fourteenth Amendment. See, e.g., San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 623 n.1, 101 S. Ct. 1287, 1289 n.1 (1981).

Plaintiff's claim is not ripe for review because HPD has not yet enforced the violations against her and there has been no final decision on plaintiff's liability. Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 105 S. Ct. 3108, 3116 (1985). Plaintiff has avenues under state law for challenging the violations and perhaps avoiding liability but she has not availed herself of those procedures.

Even if the Court were to find that the issuance of the NOV's and the implicit requirement that plaintiff correct the violations in order to clear her record constituted a final agency decision, plaintiff's claim is still insufficient as a matter of law because there has been no "taking" of her property. In Kraebel v. New York City Dept. of Housing, Preservation & Development, 959 F.2d 395 (2d Cir. 1992), the Second Circuit dismissed a different takings clause claim which was premised upon a similar type of argument. In Kraebel, plaintiff alleged that the delays and documentation requirements in the administration of the SCRIE program, [10] which provides landlords with elderly tenants with dollar-for-dollar tax abatements as a means of reimbursing the landlords for certain reductions in rental income, constituted a taking of her property without just compensation. Kraebel, 959 F.2d at 402. The Court of Appeals found that although plaintiff suffered an economic injury, the public interest served by the challenged regulation and prior Supreme Court precedent denying relief in similar circumstances compelled it to dismiss her claim. Id. The Court quoted language from Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440, 102 S. Ct. 3164, 3178 (1982), which is equally applicable to the present case:

---

[10] "SCRIE" stands for Senior Citizen Rent Increase Exemption. Kraebel, 959 F.2d at 398-99.

> States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails.

Id.

The reporting of HMC violations and the concomitant requirement that they be corrected substantially furthers the legitimate governmental interest in ensuring the safety and habitability of rental housing. Moreover, plaintiff has made no showing that she has been denied all economic use of the Property. Therefore, the application of the HMC to plaintiff's property is not so unreasonable as to constitute a confiscation of her property by the City. See id. See also Agins v. City of Tiburon, 447 U.S. 255, 260-63, 100 S. Ct. 2138, 2141-42 (1980). Accordingly, plaintiff's Fifth Amendment claim is dismissed.

Attorneys' Fees

Plaintiff's Eleventh Cause of Action alleges that she is entitled to attorneys' fees pursuant to 42 U.S.C. § 1988. Plaintiff, who is an attorney, has requested attorneys' fees and costs to compensate her for her own efforts in this litigation.

Section 1988 provides that a court may award reasonable attorneys' fees to a prevailing party in a civil rights action. 42 U.S.C.A. § 1988 (West Supp. 1994). Since plaintiff is not a prevailing party, her claim for attorneys' fees and costs is without merit.

Claims Which Raise No Constitutional Issues

The remainder of plaintiff's claims raised no constitutional issues, but rather raise state law defenses to the violations reported on the property which can and should be

adjudicated in Housing Court. Pendent jurisdiction over the state law claims is discretionary, United Mine Workers of America v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 1139 (1966), and since all of plaintiff's federal claims have now been dismissed before trial, the Court is of the view that the Housing Court should hear the remainder of plaintiff's claims in the event plaintiff should decide to bring an action in that forum. See id. Accordingly, the remaining claims relating to the validity of the violations are hereby dismissed.

Two of the three grounds raised in plaintiff's cross-motion for partial summary judgment raise state law defenses to the reported violations. Specifically, plaintiff has requested the Court to find that the statute of limitations has run against those violations reported over the last three years. Plaintiff has also requested the Court to find invalid as a matter of law the HMC violations outstanding against the property which plaintiff has certified as corrected and which HPD either did not inspect within the 70 day limit or notified plaintiff that her certifications were not accepted. Because these claims may be heard in Housing Court, they have been dismissed for the reasons stated above. Accordingly, plaintiff's motion for partial summary judgment on these two remaining claims is denied.

In sum, defendants' motion for summary judgment is hereby GRANTED. Plaintiff's motion for partial summary judgment is DENIED.

SO ORDERED.

Dated: New York, New York
August 19, 1994

/s/ John S. Martin, Jr.
JOHN S. MARTIN, JR., U.S.D.J.

cc: Barbara Kraebel
60 East 42nd Street #1146
New York, N.Y. 10165

Virginia Waters
Assistant Corporation Counsel
New York City Law Department
100 Church Street
New York, N.Y. 10007

APPENDIX C

93 **CIVIL** 4596 (JSM)

JUDGMENT

U.S. DISTRICT COURT
S.D.N.Y.
FILED
August 30, 1994

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BARBARA KRAEBEL D/B/A
BARKLEE REALTY COMPANY,

Plaintiff,

v.

FELICE MICHETTI, COMMISSIONER OF
THE NEW YORK CITY DEPT. OF HOUSING
PRESERVATION AND DEVELOPMENT and
THE NEW YORK CITY DEPT. OF HOUSING
PRESERVATION AND DEVELOPMENT,

Defendants.

Defendants having moved to dismiss for failure to state a claim pursuant to F.R.Civ.P. 12(b)(6), or in the

alternative, for summary judgment pursuant to F.R.Civ.P. 56(c), plaintiff having cross-moved for partial summary judgment on three on[sic] her claims, and the said motions having come before the Honorable JOHN S. MARTIN, U.S.D.J., thereafter the Court having treated the motion as one for summary judgment and the Court thereafter on August 22, 1994, having rendered its memorandum opinion and order (#73590); denying plaintiff's cross-motion for partial summary judgment on three of her claims, and granting defendants' motion for summary judgment, it is,

ORDERED, ADJUDGED AND DECREED: That plaintiff's cross-motion for partial summary judgment be and it is hereby denied, and it is further,

ORDERED, that defendants' motion for summary judgment be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed for the reasons stated in the Court's Memorandum Opinion and Order, dated August 22, 1994.

DATED: NEW YORK, NEW YORK
August 30, 1994

JAMES M. PARKISON
Clerk

By:/s/ Ronald Church
Deputy Clerk

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 8/31/94

APPENDIX D

Dkt. No: 94-7996
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Filed
June 28, 1995

GEORGE LANGE III, CLERK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28 day of June one thousand nine hundred and ninety-five.

Kraebel,

Plaintiff-Appellant,

v.

Michetti,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Barbara Kraebel.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk

By:
/s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

APPENDIX E

UNITED STATES CONSTITUTION

Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

UNITED STATES CODE

Title 42, Section 1983:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX G

NEW YORK CITY HOUSING MAINTENANCE CODE (NEW YORK CITY ADMINISTRATIVE CODE, TITLE 27 CHAPTER 2)

...

§27-2005 Duties of owner.

a. The owner of a multiple dwelling shall keep the premises in good repair.

b. The owner of a multiple dwelling, in addition to the duty imposed upon such owner by subdivision a of this section, shall be responsible for compliance with the requirements of this code, except insofar as responsibility for compliance is imposed upon the tenant alone.

c. The owner of a one- or two-family dwelling shall keep the premises in good repair, and shall be responsible for compliance with the provisions of this code, except to the extent otherwise agreed between such owner and any tenant of such dwelling by lease or other contract in writing, or except insofar as responsibility for compliance with this code is imposed upon the tenant alone.

...

§27-2111 Moneys collected by department payable to special repair fund. All penalties and all other moneys recovered for costs, expenses and disbursements that are reimbursable under this code for the repair or rehabilitation of a dwelling shall be paid into a separate fund in the treasury of the city.

Such fund shall be available to the department for the purpose of meeting the costs, expenses and disbursements for the repair or rehabilitation of dwellings pursuant to the provisions of this code.

...

§27-2115 Imposition of civil penalty.

(a) A person who violates any law relating to housing standards shall be subject to a civil penalty of not less than ten dollars nor more than fifty dollars for each non-hazardous violation, not less than twenty-five dollars nor more than one hundred dollars and ten dollars per day for each hazardous violation, fifty dollars per day for each immediately hazardous violation, occurring in a multiple dwelling containing five or fewer dwelling units, from the date set for correction in the notice of violation until the violation is corrected, and not less than fifty dollars nor more than one hundred fifty dollars and, in addition, one hundred twenty-five dollars per day for each immediately hazardous violation, occurring in a multiple dwelling containing more than five dwelling units, from the date set for correction in the notice of violation until the violation is corrected. A person wilfully making a false certification of correction of a violation shall be subject o a civil penalty of not less than fifty dollars nor more than two hundred fifty dollars for each violation falsely certified, in addition to the other penalties herein provided.

(b) The department shall serve a notice of violation upon the owner, his or her agent or other person responsible for its correction. The notice shall identify the condition constituting the violation, the provision of law applicable thereto, the department's order number, the classification of the violation according to its degree of hazard, the time for certifying the correction of such violation, and the amount of the possible penalty. It shall also advise that the department

will, if requested, confer with the owner or his or her representative concerning the nature and extent of the work to be done to insure compliance and the methods of financing such work. In any case where the provisions of this section authorize the service of such notice by mail, the statement of any officer, clerk, or agent of the department, or of anyone authorized by the department to mail such notice of violation, subscribed and affirmed by such person as true under the penalties of perjury, which describes the mailing procedure used by the department, or by the department's mailing vendor, or which states that these procedures were in operation during the course of mailing a particular cycle of notices of violation, shall be admitted into evidence as presumptive evidence that a regular and systematic mailing procedure is followed by the department for the mailing of its notices of violation. Where the department introduces into evidence the business records which correspond to the various stages of the mailing of a particular cycle of notices of violation, pursuant to subdivision (c) of rule forty-five hundred eighteen of the civil practice law and rules, then a presumption shall have been established that the mailing procedure was followed in the case of such cycle, and that such notice of violation has been duly served.

(c) The said notice of violation shall also specify the date by which each violation shall be corrected. Such date shall be:

(1) ninety days from the date of mailing of the notice in the case of non-hazardous violations; (2) thirty days from the date of mailing of the notice in the case of hazardous violations; and (3) twenty-four hours in the case of immediately hazardous violations in which case the notice shall be served by personal delivery to a person in charge of the premises or to the person last registered with the city as the owner or agent, or, by registered or certified mail, return receipt requested, to the person in charge of the premises or

to the person last registered with the department as the owner or agent; provided that where a managing agent has registered with the department, such notice shall be served on the managing agent. Service of the notice shall be deemed completed five days from the date of mailing. The department may postpone the date by which a violation shall be corrected upon a showing, made within the time set for correction in the notice, that prompt action to correct the violation has been taken but that full correction cannot be completed within the time provided because of technical difficulties, inability to obtain necessary materials, funds, or labor, or inability to gain access to the dwelling unit wherein the violation occurs or such other part of the building as may be necessary to make the required repair. In the case of immediately hazardous violations such showing must be made prior to the close of business on the next full day the department is open following the period set for correction. The department may condition such postponement upon the applicant's written agreement to correct all violations placed against the premises by the department or other appropriate governmental agency and to satisfy within an appropriate period of time, all sums owing to the department for repairs made to said premises. The department may require such other conditions as are deemed necessary to insure correction of the violations within the time set by the postponement. The department shall prepare a written statement signed and dated by the person making such decision setting forth the reasons for the postponement of the date by which a violation shall be corrected or the reason for the denial of such application for postponement and said written statement shall be part of the record of the department.

(d) On or before September first, nineteen hundred seventy-two, the department shall classify all violations of the multiple dwelling law, the housing maintenance code and other applicable state and local laws as non-hazardous, hazardous and immediately hazardous, secure the approval

thereof by the advisory council to the housing part of the civil court of the city of New York and publish such classification in the City Record. Such classification shall be based on the effect of the violation upon the life, health or safety of the occupants of the building and upon the public. After October first, nineteen hundred seventy-two and prior to October fifteenth, nineteen hundred seventy-two, the department shall hold a public hearing on the proposed classifications. Notice of such public hearing shall be published in the City Record not less than thirty days prior to the hearing. Within fifteen days after the conclusion of the said hearing, the department shall forward to the advisory council the list with such proposed changes as it may recommend for their approval. Within ten days of the receipt of such list, the advisory council shall advise the department as to which changes they have approved. The department shall thereupon, within five days, cause the list, together with such changes as have been approved to be published once each week for two successive weeks in the City Record. Any person who may be aggrieved as an owner or tenant may, within thirty days of such first publication seek a review of the department's action, provided that no such review shall stay the effectiveness of such list or the operation of the housing part of the civil court of the city of New York. Thereafter, and from time to time, the department may modify the list with the approval of the advisory council after publication, and public hearing as provided for the original list.

(e) In the event the department fails to promulgate such list as above provided, or to take any step in connection therewith within the time provided, the administrative judge of the civil court and the judicial conference may take such action as they deem necessary to insure the establishment of the housing part of the New York city civil court and its operation on April first, nineteen hundred seventy-three, as provided by law.

(f)(1) The notice of violation shall direct that when any violations of a particular class have been corrected, they shall be certified at one time to the department. Such certification shall be made in writing, under oath by the registered owner, a registered officer or director of a corporate owner or by the registered managing agent. Such certification shall be delivered to the department and acknowledgement of receipt therefor obtained or shall be mailed to the department by certified or registered mail, return receipt requested, no later than fourteen days after the date set for correction in the case of nonhazardous and hazardous violations, and no later than five days after the date set for correction in the case of immediately hazardous violations, and shall include the date when each violation was corrected. Such certification of correction shall be supported by a sworn statement by the person who performed the work if performed by an employee or agent of the owner.

(2) A copy of such certification shall then be mailed not more than twelve calendar days from the date of receipt of notification to any complainant by the department.

(3) Such violation shall be deemed corrected seventy days from the date of receipt of such certification by the department unless the department has determined by a reinspection made within such period that the violation still has not been corrected and has recorded such determination upon its records and has notified the person who executed the certification by registered or certified mail to the address stated in the certification that it has been set aside and the reasons therefor; a copy of such notice shall be sent to the complainant.

(4) If the department does not inspect the premises after notification by the complainant that a violation has not been corrected, any tenant affected by such false certification shall have the right to apply to the court for a determination

of violation as provided in subdivision (h) of this section, at which time the court shall assess appropriate penalties as provided in this section for any wilfully false certification it finds.

(5) Upon receipt of notice that the certification has been set aside the owner or his or her agent shall then have a right to apply to the court for a determination that such violation was corrected. Notice of such right shall appear on each notice that a certification has been set aside.

(6) Notwithstanding the foregoing, in the event an owner files with his or her certification a copy of a contract of sale or letter of commitment for a mortgage or refinancing of a mortgage covering the premises and further certifies that such sale or mortgage transaction is to occur within one hundred days of such certification, such violation shall be deemed corrected thirty days from the date of receipt of such certification by the department, unless the department has determined by reinspection made within such period that the violation still has not been corrected, has recorded such determination upon its records and has given notice of such determination to the owner, and has thereafter brought an action within thirty days to set aside such certification, to impose a penalty for false certification and to collect such other penalties as have accrued, provided that in all such cases, the department shall make such reinspection.

(7) Failure to file such certification of compliance shall establish a prima facie case that such violation has not been corrected.

(g) When there are a number of separate instances of a single condition which violates any housing standard established by law, such separate instances shall be treated collectively as a single violation with respect to any one dwelling unit, or with respect to the public area of a building,

but nothing contained in this subdivision shall limit the number of violations for which a penalty under this section may be collected with respect to each dwelling unit or the public area of a building.

[Subdivisions (h) - (k) regarding tenant enforcement of violations and enforcement of specific violations not relevant to this proceeding are omitted for purposes of this Appendix.]

§27-2116 Enforcement of civil penalty; powers of housing part of the civil court, collection of judgment.

(a) The department may bring an action in the housing part of the New York city civil court for the recovery of civil penalties, together with costs and disbursements. Leave of court, obtained by motion to the housing part thereof, shall be required for disclosure or for a bill of particulars, except for a notice under section three thousand one hundred twenty-three of the civil practice law and rules, which shall be granted only upon a showing that such disclosure or bill of particulars is necessary to the prosecution or defense of the action. If it is so noted on the summons, any motion for disclosure or a bill of particulars must be made in writing and on notice and must be filed with the clerk with proof of service no later than thirty days after joinder of issue.

(b) The owner shall be responsible for the correction of all violations, but in an action for civil penalties may in defense or mitigation of such owner's liability for civil penalties show:

(1) That the violation or violations were corrected within the time specified in the notice of violation and the certificate of compliance was duly filed; or

(2) That the violation did not exist at the time the notice of violation was served; or in mitigation or remission of his or her liability for civil penalties show:

(i) That he or she began to correct the violation promptly upon receipt of the notice of violation, but that its full correction could not be completed within the time provided because of technical difficulties, inability to obtain necessary materials, funds or labor, or inability to gain access to the dwelling unit wherein the violation occurs, or such other portion of the building as might be necessary to make the repair; or

(ii) That he or she was unable to obtain a permit or license necessary to correct the violation, provided that diligent and prompt application was made therefor; or

(iii) That the violation giving rise to the action was caused by the act or negligence, neglect or abuse of another not in the employ or subject to the direction of the defendant.

Where the aforesaid allegations are made by way of mitigation of penalties, the owner shall show, by competent proof, pertinent financial data, and efforts made to obtain necessary materials, funds or labor or to gain access, or to obtain a permit or license and such other evidence as the court may require.

If the court finds that sufficient mitigating circumstances exist, it may remit all or part of any penalties arising from the violation, but may condition such remission upon a correction of the violation within a time period fixed by the court.

(c) A defendant in an action for civil penalties who asserts that a violation was caused by the act, negligence,

neglect or abuse of a third party who has commenced an action against such third party and may request the court to permit consolidation of defendant's action for the reasonable cost of such correction against such third party with the pending action for penalties, or if no other action is then pending against such third party, defendant may make application to implead the party alleged to have caused the act, negligence, neglect or abuse. Upon a finding that the violation in issue was caused by such third party, a judgment shall be entered against such third party in favor of the defendant for the reasonable cost of such correction.

(d) When the department obtains a determination in an action under this article against an owner, judgment may be entered against the premises which shall constitute a lien when a transcript of such judgment is filed in the office of the county clerk in the manner prescribed for the filing of judgments and may be enforced against the premises, and, if such judgment remains unsatisfied for ninety days, as a levy upon the rents, pursuant to section 27-2148 of article eight of this subchapter.

§ 27-2117. Stay of accumulation of per diem penalties during pendency of action.

(a) In any action for penalties under this article, the defendant may move at any time before the trial of the case for an order to stay the further accumulation of the per diem penalty from the day the action is commenced until the same is finally terminated by judgment or otherwise, including the time necessary for judicial review. The housing part of the civil court shall grant the motion if the defendant shows to the satisfaction of the court that there is a substantial and real issue of fact or law concerning the existence of the violation charged. The court may impose such conditions on the granting of the motion as justice may require.

(b) Nothing in this article shall prevent an owner from contesting the finding of a violation by the department, in advance of the department's action for the collection of penalties in the housing part of the civil court of the city of New York or by any other means provided by law. In any such action or proceeding, the court may stay the further accumulation of the per diem penalty in the same manner and under the same conditions as provided in subdivision (a) of this section.

§ 27-2118. Penalties; willful or reckless violations; false statements.

(a) Any person who

(1) Willfully or recklessly violates any provisions of this chapter; or

(2) Willfully or recklessly violates, or fails to comply with, any requirement of an order of the department; or

(3) Willfully makes, or causes any other person to make, any false or misleading statement on any registration statement, notice, or other document required to be filed pursuant to this chapter, or on any application, or any accompanying document, for the granting of any permit or any other action by the department pursuant to this chapter, shall be guilty of a misdemeanor punishable by a fine or not less than ten dollars nor more than one thousand dollars for each such violation, or by imprisonment up to one year, or by both such fine and imprisonment.

(b) A person commits a willful violation when such person intentionally acts, or intentionally fails to act, to cause a desired result that violates this chapter. A person commits

a reckless violation when such person acts, or fails to act, with a conscious disregard of a substantial risk that the act or failure to act will result in a condition, constituting a violation of this code, which will endanger the life, health or safety of another person.

(c) In a prosecution for a willful or reckless violation of a provision of this chapter, evidence of prior service of civil process or of prior judgments for civil penalties arising from the same violation, and relating to the same dwelling, shall be admissible on the issue of the defendant's knowledge of the existence of the violation.

(d) Evidence that the defendant had knowledge or notice of the violation and failed to correct the same for more than six months or take reasonable action to explain to the department this failure or inability to make the correction shall be relevant on the issue of the willfulness of defendant's action. This subdivision shall not be construed to prevent conviction for a willful violation on other grounds.

§27-2119. Penalties; refusal to admit and interference with inspection; failure to submit reports.

Any person (1) who refuses entry, or access to an officer or inspector of the department to any premises or part thereof that the officer or inspector is lawfully authorized to inspect, or who unreasonably interferes with an authorized inspection; or (2) who fails to file any report or other paper which such person is required to file, under this code, except a statement of registration or other paper under article two of subchapter four of this chapter, shall be guilty of an offense, punishable by a fine or not more than fifty dollars, or by imprisonment for not more than thirty days, or by both such fine and imprisonment.

APPENDIX H

NEW YORK CIVIL PRACTICE LAW AND RULES

§ 201. Application of article.

An action, including one brought in the name or for the benefit of the state, must be commenced within the time specified in this article unless a different time is prescribed by law or s shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action.

...

§214 (in pertinent part).
Actions to be commenced within three years:
... for penalty created by statute; ...

The following actions must be commenced within three years:

...

2. an action to recover upon a liability, penalty or forfeiture created or imposed by statute ...

...

APPENDIX I

NEW YORK CIVIL COURT ACT

§110 Housing Part (in relevant part):

(a) A part of the court shall be devoted to actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standards, including, but not limited to, the multiple dwelling law and the housing maintenance code, building code and health code of the administrative code of the city of New York, as follows:

(1) Actions for the imposition and collection of civil penalties for the violation of such laws.

(2) Actions for the collection of costs, expenses and disbursements incurred by the city of New York in the elimination or correction of a nuisance or other violation of such laws, or in the removal or demolition of any dwelling pursuant to such laws.

(3) Actions and proceedings for the establishment, enforcement or foreclosure of liens upon real property and upon the rents therefrom for civil penalties, or for costs, expenses and disbursements incurred by the city of New York in the elimination or correction of a nuisance or other violation of such laws.

(4) Proceedings for the issuance of injunctions and restraining orders or other orders for the enforcement of housing standards under such laws.

(5) Actions and proceedings under article seven-A of the real property actions and proceedings law, and all

summary proceedings to recover possession of residential premises to remove tenants therefrom, and to render judgment for rent due, including without limitation those cases in which a tenant alleges a defense under section seven hundred fifty-five of the real property actions and proceedings law, relating to stay or proceedings or action for rent upon failure to make repairs, section three hundred two-a of the multiple dwelling law, relating to the abatement of rent in case of certain violations of section D26-41.21 of such housing maintenance code.

(6) Proceedings for the appointment of a receiver of rents, issues and profits of buildings in order to remove or remedy a nuisance or to make repairs required to be made under such laws.

(7) Actions and proceedings for the removal of housing violations recorded pursuant to such laws, or for the imposition of such violation or for the stay of any penalty thereunder.

(8) Special proceedings to vest title in the city of New York to abandoned multiple dwellings.

(9) The city department charged with enforcing the multiple dwelling law, housing maintenance code, and other state and local laws applicable to the enforcement of proper housing standards may commence any action or proceeding described in paragraphs one, two, three, four, six and seven of this subdivision by an order to show cause, returnable within five days, or within any other time period in the discretion of the court. Upon the signing of such order, the clerk of the housing part shall issue an index number.

(b) On the application of any city department, any party, or on its own motion, the housing part of the civil court shall, unless good cause is shown to the contrary, consolidate

all actions and proceedings pending in such part as to any building.

(c) Regardless of the relief originally sought by a party the court may recommend or employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes they will be more effective to accomplish compliance or to protect and promote the public interest; provided in the event any such proposed remedy, program or procedure entails the expenditure of monies appropriated by the city, other than for the utilization and deployment of personnel and services incidental thereto, the court shall give notice of such proposed remedy, program or procedure to the city department charged with the enforcement of local laws relating to housing maintenance and shall not employ such proposed remedy, program or procedure, as the case may be, if such department shall advise the court in writing within the time fixed by the court, which shall not be less than fifteen days after such notice has been given, of the reasons such order should not be issued, which advice shall become part of the record. The court may retain continuing jurisdiction of any action or proceeding relating to a building until all violations of law have been removed.

(d) In any of the actions or proceedings specified in subdivision (a) and on the application of any party, any city department or the court, on its own motion, may join any other person or city department as a party in order to effectuate proper housing maintenance standards and to promote the public interest.

(e) Actions and proceedings before the housing part shall be tried before civil court judges, acting civil court judge, or housing judges. Housing judges shall be appointed pursuant to subdivision (f) of this section and shall be duly constituted judicial officers, empowered to hear, determine

and grant any relief within the powers of the housing part in any action or proceeding except those to be tried by jury. Such housing judges shall have the power of judges of the court to punish for contempts. Rules of evidence shall be applicable in actions and proceedings before the housing part. The determination of a housing judge shall be final and shall be entered and may be appealed in the same manner as a judgment of the court; provided that the assignment of actions and proceedings to housing judges, the conduct of the trial and the contents and filing of a housing judge's decision, and all matters incidental to the operation of the housing part, shall be in accordance with rules jointly promulgated by the first and second departments of the appellate division for such part.

(f) The housing judges shall be appointed by the administrative judge from a list of person selected annually as qualified by training, interest, experience, judicial temperament and knowledge of federal, state and local housing laws and programs by the advisory council for the housing part. Effective on the dates indicated, the annual salary of a housing judge shall be as follows:

[Salaries omitted for purposes of this Appendix]

(g) The advisory council for the housing part shall be composed of two members representative of each of the following: the real estate industry, tenants' organizations, civic groups and bar associations and four members from the public at large. Such members shall be appointed by the administrative judge, with the approval of the presiding justices of the first and second departments of the appellate division. The members of the advisory council shall be appointed for non-renewable terms of three years. In addition the mayor of the city of New York shall appoint one member to serve at this pleasure and the commissioner of housing and community renewal shall be a member.

(h) The advisory council shall meet at least four times a year, and on such additional occasions as they may require or as may be required by the administrative judge. Members shall receive no compensation. Members shall visit the housing part from time to time to review the manner in which the part is functioning, and make recommendations to the administrative judge and to the advisory council. A report on the work of the part shall be prepared annually and submitted to the administrative judge, the administrative board of the judicial conference, the majority and minority leaders of the senate and assembly, the governor, and the mayor of the city of New York by the thirty-first day of January of each year.

(i) Housing judges shall have been admitted to the bar of the state for at least five years, two years of which shall have been in active practice. Each housing judge shall serve full-time for five years. Reappointment shall be at the discretion of the administrative judge and on the basis of the performance, competency and results achieved during the preceding term.

(j) [Repealed]

(k) Unless a party requests a manual stenographic record by filing a notice with the clerk two working days prior to the date set for an appearance before the court, hearings shall be recorded mechanically. A party may request a transcript from a mechanical recording. Any party making a request for a copy of either a mechanically or manually recorded transcript shall bear the cost thereof and shall furnish a copy of the transcript to the court, and to the other parties.

(l) Any city department charged with enforcing any state or local law applicable to the enforcement of proper housing standards may be represented in the housing part by

its department counsel in any action or proceeding in which it is a party. A corporation which is a party may be represented by an officer, director or a principal stockholder.

(m) The service of process in any of the actions or proceedings specified in subdivision (a) which are brought under the housing maintenance code of the administrative code of the city of New York shall be made as herein provided:

[Provisions regarding notice omitted for purposes of this Appendix].

(n) Nothing contained in the[1] section one hundred ten shall in any way affect the right of any party to trial by jury as heretofore provided by law.

(o) There shall be a sufficient number of pro se clerks of the housing part to assist persons without counsel. Such assistance shall include, but need not be limited to providing information concerning court procedure, helping to file court papers, and, where appropriate, advising persons to seek administrative relief.

(p) The court shall review the performance and records of administrators appointed pursuant to article seven-A of the real property actions and proceedings law or receivers appointed pursuant to paragraph six of subdivision (a) of this section. Such review shall include but not be limited to an examination of the accountings submitted by such administrators or receivers and an examination of the plan submitted to the court pursuant to subdivision nine of section seven hundred seventy-eight of the real property actions and proceedings law. The court may compel the

---

[1] So in original.

production of any records it deems necessary to perform such review.

Legislative Findings [for §110]:
L.1972, c. 982, §1, as amended by L.1978, c. 310, §4, eff. June 19, 1978, provided:

"Legislative findings and statement of policy; establishment of a housing part in the New York city civil court.

"(a) The legislature finds that the effective enforcement of state and local laws for the establishment and maintenance of proper housing standards is essential to the health, safety, welfare and reasonable comfort of the citizens of the state. The legislature further finds that such effective enforcement in the city of New York has been hindered by the dispersion of prosecutions, actions and proceedings to compel compliance with housing standards among a number of criminal and civil courts, so that no single court has been able to deal consistently with all of the factual and legal problems presented by the continuing existence of housing violations in any one building. Such effective enforcement of housing standards in the city of New York has further been hindered by reliance, in a majority of instances, on criminal prosecution of the owner for housing violations, without regard to the fact that imposition of criminal penalties, usually minimal fines, has not led to the removal of the violations which gave rise to the prosecution, nor motivated the future repair and proper maintenance of the building involved. The legislature further finds that the dispersion of jurisdiction of prosecutions and proceedings to compel compliance with housing standards among a number of courts and the past reliance on criminal prosecution have provided an opportunity for some of building owners to resist the proper enforcement of housing standards by abuse of

procedural devices for dilatory purposes, evasion of service of process, failure to heed orders to remove violations, treating the payment of small criminal fines as a lesser cost of doing business than the cost of repair and removal of violations. The legislature further finds that the establishment of adequate judicial procedures and machinery for the effective enforcement of building standards in the city of New York is a necessity in the public interest.

"(b) The legislature finds that the effective enforcement of proper housing standards in the city of New York will be greatly advanced by the creation of a housing part of the civil court of the city of New York with jurisdiction of sufficient scope (i) to consolidate all actions related to effective building maintenance and operation, (ii) to recommend or employ any and all of the remedies, programs, procedures and sanctions authorized by federal, state or local laws for the enforcement of housing standards, regardless of the relief originally sought by the plaintiff, if it believes that such other or additional remedies, programs, procedures or sanctions will be more effective to accomplish and protect and promote the public interest and compliance; and (iii) to retain continuing jurisdiction of any action or proceeding relating to a building until all violations of state or local laws for the establishment and maintenance of proper housing standards have been removed and until it is satisfied that their immediate recurrence is not likely.

"(c) The legislature finds that it would be beneficial to the operation of the new housing part of the civil court if the actions and proceedings were tried therein before civil court judges, acting civil court judges, or housing judges whose background, interests and training demonstrate a broad knowledge of housing problems, current remedial programs, and a determination to secure the expeditious enforcement of state and local laws concerning the maintenance of proper housing standards; assignments of such civil court judges,

acting civil court judges, or housing judges should be for a sufficiently extensive period of time to assure expertise, continuity and the meaningful continuing jurisdiction deemed desirable and necessary to effect the state purposes herein."

APPENDIX J

NEW YORK MULTIPLE DWELLING LAW

§ 328. Central Violations Bureau

1. In cities having a population of one million or more, the department shall establish a central violations bureau which shall establish and maintain currently an index showing and a file containing, with respect to each building located in the city, the name, address and telephone number of the present owner of the building and whether or not he is a member in good standing of the rent stabilization association or registered pursuant to the emergency tenant protection act of nineteen seventy-four or the rent stabilization law of nineteen hundred sixty-nine where one of more dwelling units therein are subject to the rent stabilization law, each notice and order of the building department, the fire department, the health department, the water supply, gas and electricity department and of every other municipal department or agency having jurisdiction over such building alleging the occupation of such building in violation of law or the existence of a nuisance therein and of each notice, order, rule or certificate showing the clearance, correction or abatement of such violation or nuisance.

2. It shall be the duty of the department and of every other municipal department and agency having jurisdiction over building located in the city of New York to file with the central violations bureau established by this section a true copy of each notice and order of such department or agency alleging the occupation of a building in violation of law or the existence of a nuisance therein and of each notice, order, rule or certificate showing the clearance, correction or abatement of such violation or nuisance within seventy-two hours from the date of issuance of such notice, order, rule or certificate.

3. In any action or proceeding before the housing part of the New York city civil court either (a) the visually displayed or (b) the printed computerized violation files of the department responsible for maintaining such files and all other computerized data as shall be relevant to the enforcement of state and local laws for the establishment and maintenance of housing standards, including but not limited to the name, address and telephone number of the present owner of the building and whether or not he is a member in good standing of the rent stabilization association or registered pursuant to the emergency tenant protection act of nineteen hundred seventy-four or the rent stabilization law of nineteen hundred sixty-nine where one or more dwelling units therein are subject to the rent stabilization law, shall be prima facie evidence of any matter stated therein and the courts shall take judicial notice thereof as if same were certified as true under the seal and signature of the commissioner of that department.

APPENDIX K

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, RULES AND REGULATIONS

Chapter 9. Removal of Violations Issued Pursuant to the Housing Maintenance Code

§9-01 General Provisions. The purpose of the Dismissal Request Program is to provide owners of multiple dwellings, private dwellings, and co-operative and condominium units, in New York City with a mechanism for obtaining re-inspections of their properties for the purpose of removing corrected housing code violations from the records of the Department.

§9-02 Eligible Applicants. (a) The Department will accept Dismissal Requests from owners for re-inspections of properties in each of the five boroughs of the City of New York.

(1) Owners and managing agent of multiple dwellings must be registered with the Department in accordance with the provisions of §§27-2097 through 27-2099 of the Housing Maintenance Code in order to submit a Dismissal Request.

(2) Owners of co-operative and condominium units and private dwellings must submit proof of ownership satisfactory to the Department in order to submit a Dismissal Request.

§9-03 Fee. Each Dismissal Request must be accompanied by a fee of one hundred thirty-five dollars ($135)* in the form of a certified check or money order, made payable to the New York City Commissioner of Finance.

§9-04 Re-inspection. (a) The Department shall use its best efforts to re-inspect the premises within 45 days of the date of receipt of the Dismissal Request in the Borough office and shall place in the mail to the applicant a copy of the inspection report indicating the results of such re-inspection within 45 calendar days of the date of receipt of the Dismissal Request in the Borough office.

(b) In the event the Department does not inspect and mail a copy of such inspection report within the aforementioned 45 days, the fee shall be returned to the owner. Notwithstanding the refund of the fee, the Dismissal Request shall continue to be processed in the regular course of business. A re-inspection of the property will be made and a copy of the inspection report indicating the results of the reinspection will then be mailed to the owner.

§9-05 Submission of Dismissal Requests. (a) A Dismissal Request must be submitted on a form that can be obtained at any Division of Code Enforcement Office (Borough Office) between 9 a.m. and 5 p.m., either in person or by mail request. (See address below.)

(b) The Dismissal Request form, together with the fee, must be submitted either in person or by mail to the Borough Office in the borough in which the property is located.

---

* [Since these regulations were issued, HPD has increased the fee for these inspections to $300].

[Division of Code Enforcement Borough Office addresses omitted for purposes of this Appendix.]

§9-06 Exceptions to the Dismissal Request Procedure. (a) The aforementioned procedures shall not apply to premises which are:

(1) the subject of pending Department-related litigation;

(2) subject to a lien arising from an uncollected judgment relating to an action or proceeding brought by the Department;

(3) building(s) for which an inspection has been conducted within the last 60 days; or

(4) a building for which a current valid Multiple Dwelling Registration is not on file with the department.

APPENDIX L

THE CITY OF NEW YORK
DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT
FELICE L. MICHETTI, COMMISSIONER
OFFICE OF RENT AND HOUSING MAINTENANCE
DIVISION OF CODE ENFORCEMENT
150 WILLIAM STREET, NEW YORK, N.Y. 10038

ROBERT K. DAVIS, Deputy Commissioner
LAWRENCE E. SCHATT, Assistant Commissioner

PROCEDURE NO. 1-1993

EFFECTIVE DATE: May 1, 1993

TO: Chief Inspectors and Directors

FROM: Larry Schatt
Assistant Commissioner

SUBJECT: REVISED DISMISSAL REQUEST INSPECTION PROCEDURE

During the past year, we have reviewed many aspects of Code Enforcement, including the Dismissal Request (DR) inspection program. With the limited number of Housing Inspectors available, it is vital that inspections are addressing the most serious types of housing problems.

The Dismissal Request inspection program provides an opportunity to better utilize our limited resources. To focus on the most serious types of violations, we have modified the procedure for Inspectors to use when conducting a DR inspection.

Effective immediately, please instruct all Inspectors and Supervisors under your command of the following revised procedure for conducting inspections on Dismissal Requests (DR's):

When conducting a DR inspection, Inspectors are to inspect pending items as listed in the Dismissal Request application and report additional violations, if warranted, within apartments and in line of travel to those apartments only for the following conditions:

A) Class C violations, irrespective of whether the Class C violation is classified as an emergency.

B) Class B violations, only if they relate to any of the following conditions:

* window guards
* smoke detectors
* missing window glass
* vermin
* accumulation of rubbish
* exposed wiring

C) If the violation preprint indicates that a "Public Parts Inspection Is Required", a complete check of primary and secondary means of egress shall be made; including public halls and stairs, bulkhead doors, fire escapes, and fire passageways. If the building has a sprinkler system in lieu of a second means of egress, the cellar must be accessed for the purpose of

inspecting the O.S.Y. valve. All egress related violation are to be cited, irrespective of class.

D) If the preprint does not indicate that a "Public Parts Inspection Is Required", but the inspector, while in the line of travel observes defects to egress, violation should be cited irrespective of class.

NOTE:

Tenant created conditions such as double cylinder locks and illegal window gates are not be [sic] reported during a DR inspection.

cc: [Names of recipients of memo omitted for purposes of this Appendix.]

No. 95-224

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BARBARA KRAEBEL Doing Business As BARKLEE REALTY COMPANY,

Petitioner,

- against -

FELICE MICHETTI, As Commissioner of the New York City Department of Housing Preservation and Development, and THE NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

*LEONARD J. KOERNER,**
PAMELA DOLGOW,
FAY NG,
of Counsel.

** Attorney of Record*

PAUL A. CROTTY,
Corporation Counsel
of the City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 788-1034

September 21, 1995

COUNTER-QUESTIONS PRESENTED

1. Where petitioner, pro se, the owner of a sixteen-unit residential building which has been cited for violations of the New York City Housing Maintenance Code ("HMC") alleges that the HMC enforcement scheme violates procedural due process, whether the Court of Appeals properly affirmed the dismissal of her due process claims where the State provides adequate procedures whereby she may challenge Housing Code violations before there is any final deprivation of a protected interest and where petitioner has not availed herself of such procedures?

2. Whether petitioner's remaining claims were properly dismissed?

TABLE OF CONTENTS

	Page
COUNTER-QUESTIONS PRESENTED . . .	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
OPINIONS BELOW	8
REASONS FOR DENYING THE WRIT	
A. PETITIONER'S DUE PROCESS CLAIMS WERE PROPERLY DISMISSED. FIRST, PETITIONER HAS NOT BEEN DEPRIVED OF ANY PROTECTED PROPERTY INTEREST. ASSUMING, ARGUENDO, THAT PLAINTIFF HAS BEEN DEPRIVED OF A PROTECTED INTEREST, HER DUE PROCESS CLAIMS WERE NEVERTHELESS PROPERLY DISMISSED SINCE THE STATE PROVIDED ADEQUATE PROCEDURES WHEREBY OWNERS MAY CHALLENGE HOUSING VIOLATIONS AND HAVE THEM REMOVED FROM THEIR RECORD BEFORE THERE IS ANY FINAL DEPRIVATION OF A PROTECTED INTEREST.	9
B. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S REMAINING CLAIMS.	22
CONCLUSION	27

TABLE OF AUTHORITIES

CASES:

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 10

Cheffer v. Reno, 55 F.3d 1517 (11th Cir., 1995) 25

Department of Housing Preservation and Development v. DeBona, 101 A.D.2d 875, 476 N.Y.S.2d 190 (2d Dept. 1984) 13

Ex parte Young, 209 U.S. 123 (1908). 26

Kraebel v. New York City Department of Housing preservation and Development, 959 F.2d 395 (2d Cir.), cert. den., ___U.S. ___, 113 S.Ct. 326 (1992) 23

Logan v. Zimmerman Brush Co., 455 U.S. 432 (1982) 16

Mathews v. Eldridge, 424 U.S. 319 (1976). 22

Pennell v. City of the San Jose, 485 U.S. 1 (1988) 22

Steffel v. Thompson, 415 U.S. 452 (1974) 25-26

United States v. Buettner -Janusch, 646 F.2d 759 (2d Cir.),cert. denied, 454 U.S. 830 (1981) 25

Zinermon v. Burch,
494 U.S. 113 (1990) 11

U.S. CONSTITUTION

First Amendment 25-26

Fourth Amendment 23

Eighth Amendment 25,27

FEDERAL STATUTES:

42 U.S.C. § 1983 1

STATE AND LOCAL STATUTES

New York City Administrative Code
§ 27-2115 5,7,14,21

New York City Administrative Code
§ 27-2116 4,12

New York City Administrative Code
§ 27-2117(b) 6,16

New York City Civil Court Act
§ 110 6,17

N.Y. Multiple Dwelling Law
§ 328.3 19-20

STATE AND LOCAL REGULATIONS:

22 N.Y.C.R.R. § 640.1 18

22 N.Y.C.R.R. § 730.1 18

28 R.C.N.Y. § 9-03 5,15

28 R.C.N.Y. § 9-04 5,15

No. 95-224

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

BARBARA KRAEBEL Doing Business As BARKLEE REALTY COMPANY,

Petitioner,

- against -

FELICE MICHETTI, As Commissioner of the New York City Department of Housing Preservation and Development, and THE NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

(a)

This is an action commenced pursuant to 42 U.S.C. § 1983 by petitioner, pro

se, Barbara Kraebel ("petitioner"), against defendants-respondents, the New York City Department of Housing Preservation and Development ("HPD") and HPD Commissioner Michetti ("defendants"). Petitioner alleges that HPD's issuance of housing violations against her property violated her constitutional rights. Petitioner seeks to have this Court review by way of certiorari a summary order of the United States Court of Appeals for the Second Circuit, entered May 8, 1995, which affirmed a judgment of the District Court for the Southern District of New York (Martin, D.C.J.), entered August 30, 1994. The District Court (1) granted the defendants summary judgment dismissing the complaint and (2) denied plaintiff's cross-motion for summary judgment.

(b)

The New York City Department of Housing Preservation and Development (HPD) enforces the New York City Housing Maintenance Code.[1] HPD has jurisdiction over 135,000 multiple dwellings and there are currently over three million outstanding HMC violations recorded (113, ¶ 9).[2]

If an inspection discloses HMC violations, the inspector will issue a Notice of Violation which directs the owner to repair the condition. The owner

---

[1] New York City Administrative Code, § 27-2000, et. seq. Hereinafter, provisions of the Housing Maintenance Code will be cited as "HMC" followed by the specific section of the Code being cited.

[2] Numbers in parentheses refer to pages of the Joint Appendix submitted to the Court of Appeals for the Second Circuit; numbers preceded by the letter "A" refer to the Appendix annexed to the Petition for a Writ of Certiorari.

is also advised that he or she may be subject to fines for the failure to cure the violation. A Notice of Violation, however, is not self-executing. To collect a fine, HPD must commence an action in the Housing Part of the New York City Civil Court and obtain a judgment. In such an action, the building owner may interpose defenses, including alleging that the violations were improperly issued or have been cured. HMC § 27-2116; (112, ¶¶ 7-8).

Owners may seek to have a violation removed from the record before an enforcement action is commenced by availing themselves of a number of options. First, an owner can certify on the Notice of Violation that the violation has been cured and return it to HPD. This certification must be made

within a specific statutory time period. Upon receipt of the certification, HPD has 70 days to reinspect the premises. If no inspection is made within this time period, the violation is deemed corrected. HMC § 27-2115(f)(3);(111;¶4).

If the owner is unable to make this certification within the statutory time period set forth for the certification process, he or she can then proceed under the Dismissal Request Inspection Program, 28 R.C.N.Y. Ch. 9 (1991). Under this program, upon payment of a $300 fee, an owner may request a re-inspection to determine whether the violations have been cured. 28 R.C.N.Y. §§ 9-03, 9-04.

Finally, if an owner believes that a violation was erroneously or unlawfully issued or if he or she has a valid defense to the violation, the owner may

commence a proceeding in the Housing Part of the New York City Civil Court to contest the violation (114, ¶ 10); HMC § 27-2117(b); N.Y. Civil Court Act § 110.

(c)

Petitioner is the owner of a sixteen-unit residential building located at 205 West 147th Street, Manhattan, New York City ("subject buildings").

The subject building, which petitioner purchased in 1983 for $35,000, is subject to the New York Rent Control and Rent Stabilization Laws, and has a yearly rent role of $50,400 (48, ¶ 41; 67, ¶ 147). Presently, there are thirty-one violations outstanding against the subject building: eight Class A ("non-hazardous") violations, 22 Class B ("hazardous") violations and one Class C

("immediately hazardous") violation (45, ¶ 25).

Pursuant to the certification process set forth in HMC, § 27-2115(f)(3), petitioner certified that some of the violations have been corrected. HPD, however, determined either that (1) the certifications were untimely or (2) the violations still exist (Pet., pp. 6-7).

Petitioner has not applied for a re-inspection of her property pursuant to HPD's Dismissal Request Program[3]. Further, petitioner can, but has not, commenced a proceeding to challenge the violations in a proceeding in the state

---

[3] After meeting with petitioner regarding the violations outstanding against her property, HPD offered to re-inspect her property pursuant to the Dismissal Request Program without requiring her to pay a fee. Petitioner, however, declined this offer (73, ¶ 5).

courts. Finally, HPD has not commenced a judicial proceeding to enforce the Notices of Violation and thus, no finding of liability has been made against petitioner or any penalties imposed upon her.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit unanimously affirmed the District Court's judgment granting the respondents summary judgment dismissing the complaint (A1a-3a). Upon review of all of the parties' contentions, the Court of Appeals affirmed "substantially for the reasons set forth in the district court's comprehensive opinion" (A3a).

In a Memorandum Opinion and Order dated August 19, 1994, the District Court granted defendants summary judgment,

denied petitioner's motion for partial summary judgment and dismissed the complaint (A4a-A29a). The District Court detailed HPD's enforcement scheme and then addressed and analyzed each of plaintiff's claims separately, as discussed more fully below.

REASONS FOR DENYING THE WRIT

A. PETITIONER'S DUE PROCESS CLAIMS WERE PROPERLY DISMISSED. PETITIONER HAS NOT BEEN DEPRIVED OF ANY PROTECTED PROPERTY INTEREST. ASSUMING, ARGUENDO, THAT PLAINTIFF HAS BEEN DEPRIVED OF A PROTECTED INTEREST, HER DUE PROCESS CLAIMS WERE NEVERTHELESS PROPERLY DISMISSED SINCE THE STATE PROVIDED ADEQUATE PROCEDURES WHEREBY OWNERS MAY CHALLENGE HOUSING VIOLATIONS AND HAVE THEM REMOVED FROM THE RECORD BEFORE THERE IS ANY FINAL DEPRIVATION OF A PROTECTED INTEREST.

(1)

Petitioner alleges that the HMC enforcement scheme violates due process because HPD does not provide owners with an adequate mechanism to clear up violations of record where the violations were either issued erroneously or have been corrected (Pet.,pp.16-20). In dismissing her due process claims, the District Court properly held that petitioner has not alleged that she has been deprived of a constitutionally protected property right, reasoning that she did not have any "entitlement to an unblemished housing record" (A10a) (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)).

Assuming, arguendo, however, that petitioner has adequately alleged a deprivation of a protected property

interest, petitioner's due process claims were still inadequate as a matter of law because any deprivation was not without due process. Zinermon v. Burch, 494 U.S. 113 (1990) ("In procedural due process claims, the deprivation by state action of a constitutionally protected interest . .. is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law.") (Emphasis in the original).

The District Court properly found in this case that the adequate state procedures which exist for "clearing erroneous or obsolete violations from an owner's record more than adequately provide plaintiff with several meaningful opportunities to contest the findings of

violation prior to any deprivation of property" (A15a).

In this case, the only enforcement action taken against petitioner was the issuance of Notices of Violation. The issuance of a Notice of Violation, however, does not finally deprive her of a protected interest since the Notice of Violation is not self-executing. The only method by which HPD can obtain civil penalties or fines for housing violations is to commence a proceeding in the Housing Part of the New York City Civil Court. HMC § 2116. In any such proceeding, petitioner may assert as a defense that the violations were improperly issued or have been corrected. HMC § 2116(b). Thus, petitioner has an adequate opportunity to contest the Notices of Violation before any liability

is imposed against her. In fact, in Department of Housing Preservation and Development v. DeBona, 101 A.D.2d 875, 476 N.Y.S.2d 190 (2d Dept. 1984), the New York State Appellate Division held that the Housing Maintenance Code afforded owners a constitutionally adequate opportunity to contest a violation prior to the deprivation of any property rights because an owner could challenge a violation by interposing a defense in an enforcement action before any finding of liability is made.

Contrary to petitioner's contention, she need not sit and wait until HPD commences an enforcement action to have the violations removed from record.

First, an owner may seek to remove a violation by certifying on the Notice of Violation that the violations listed

therein have been corrected. HPD then has 70 days from that certification to re-inspect the premises. If HPD fails to do so, the violations are deemed corrected as a matter of law. HMC § 2115(f).

Petitioner alleges that HPD has improperly rejected some of her certifications as either "untimely"[4] or "false".[5] (Pet., pp. 6-7). As discussed below, petitioner could have, but failed to, commence a proceeding to challenge these determinations or seek a new inspection to determine if the violation still exists.

---

[4] By statute, certifications must be completed within a specific time period after the issuance of a Notice of Violations.

[5] In such cases, HPD has determined that the violations have not been cured.

First, petitioner could have requested a re-inspection pursuant to HPD's Dismissal Request Program. 28 R.C.N.Y. Ch. 9. Upon payment of a $300 fee, the owner may request a re-inspection of the property and HPD will make all efforts to re-inspect and issue an inspection report within forty-five days of the request. If no inspection report is issued within forty-five days, the fee will then be refunded to the owner, but the process will continue and a re-inspection will be made in the regular course of business. Contrary to petitioner's argument, this process is not inadequate simply because she must pay a fee for the re-inspection since "[t]he State may erect reasonable procedural requirements for triggering the right to an adjudication" including

the imposition of filing fees. Logan v. Zimmerman Brush Co., 455 U.S. 432, 437 (1982). Further, HPD, in this case, has offered to reinspect her property pursuant to the Dismissal Request Program and has offered to waive the fee. Petitioner has declined this offer (73, ¶5).

Additionally, petitioner can commence a proceeding in the Housing Part of the New York City Civil Court to challenge a Notice of Violation pursuant to Section 27-2117(b) of the HMC.[6]

---

[6] HMC, § 27-2117 (b) provides:

(b) Nothing in this article [the enforcement article of the Housing Maintenance Code] shall prevent an owner from contesting the finding of a violation by the department, in advance of the department's action for the collection of penalties in the housing part of the civil court of the city of New York or by any other means provided by law. In any such action or (continued...)

Section 110 of the New York City Civil Court Act specifically provides that the Housing Part of the Civil Court shall have jurisdiction over proceedings commenced to challenge housing violations.[7] Wholly without merit is

---

[6] (...continued)
proceeding, the court may stay the further accumulation of the per diem penalty in the same manner and under the same conditions as provided in subdivision (a) of this section.

[7] Section 110 of the Civil Court Act provides, in pertinent part:

§ 110. Housing part

(a) A part of the court shall be devoted to actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standards, including, but not limited to, the multiple dwelling law and the housing maintenance code, building code and health code of the administrative code of the city of New York, as follows:

* * *

(7) Actions and proceedings for the removal of housing violations recorded pursuant to such laws, or for the imposition of such violation or for the (continued...)

petitioner's argument that this process is not adequate because of the quality of the judges and the proceedings in the Civil Court. Petitioner has not availed herself of this option and if she had, she could have sought appellate review of any adverse decision of the Civil Court. 22 N.Y.C.R.R. §§ 640.1, 730.1.

In sum, the District Court properly found that adequate opportunities exist to contest the Notices of Violation before any final determination of liability is made against petitioner. These remedies include the right to (1) assert defenses in any enforcement action (2) certify that the condition is cured (3) request a reinspection and (4)

---

[7] (...continued)
stay of any penalty thereunder.(Emphasis added).

commence a proceeding in State Court to challenge the Notice of Violation.

(2)

The District Court also properly dismissed petitioner's ninth cause of action alleging that Section 328.3 of the New York Multiple Dwelling Law and HMC § 27-2121 violate due process. These sections provide that in any action or proceeding involving a particular building, HPD shall provide access of its violation files for that building to the Housing Court and that such records "will be prima facie evidence of any matter stated therein." Petitioner alleges that the application of Section 328.3 has resulted in the Housing Court issuing orders abating rent in two dispossess proceedings as well as a delay in the

granting of her 1994-95 application for a maximum rent increase (Pet., pp. 17-18).

The District Court concluded that Section 328.2 and HMC, § 27-2121 did not violate due process, reasoning that petitioner has adequate opportunities to rebut the rebuttable presumption by challenging the violation and presenting her evidence in a proceeding in Housing Court (A18a-19a).

With respect to applications for maximum rent increases, petitioner can file a certification with the Department of Housing and Community Renewal certifying that the violations have been cleared or corrected. Alternatively, petitioner can seek a waiver of the violations by submitting proof supporting

her challenge to the violations (A20a).

(3)

Petitioner's claim that the Notices of Violation were vague and that she had to guess at what was necessary to cure the violations (Petition, p.13) is completely meritless. The Notice of Violation form specifically advises an owner that, at his or her request, "the Department will confer with you concerning the nature and extent of the work required for compliance with the law and methods of financing the required work" (122). In fact, HMC, § 27-2115(b) requires HPD to provide such assistance.

(4)

Finally, petitioner's claim that owners should be present during inspections is meritless. Due process does not require petitioner's presence at

inspections since there has been no deprivation of property or adjudication of rights at that time. See generally, Mathews v. Eldridge, 424 U.S. 319 (1976).

B. THE COURT OF APPEALS PROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S REMAINING CLAIMS.

In dismissing plaintiff's equal protection claims, the District Court properly reasoned that since plaintiff was not a member of a suspect class and because she has not alleged that HPD has burdened a fundamental right, "the challenged actions will not be unlawful unless they are not 'rationally related' to a legitimate government purpose" (A20a). See, Pennell v. City of the San Jose, 485 U.S. 1, 14-15 (1988); Kraebel v. New York City Dept. of Housing Preservation and Development, 959 F.2d 395, 402 (2d Cir.), cert. den., 113 S.Ct.

326 (1992). The Court then concluded that (27):

> It would be both financially and physically impossible for defendants to inspect each and every building subject to the code and to bring enforcement actions in every case of a violation. Therefore, the Court can find nothing irrational in defendants' decision to enforce the code selectively, especially absent any evidence produced by plaintiff of any malicious intent on the part of defendants in inspecting her property.

As the District Court properly found, petitioner submitted no evidence of any malicious intent on the part of HPD with respect to her property.

In dismissing petitioner's fourth amendment claims, the District Court properly held that inspections by housing inspectors do not violate the landlord's fourth amendment rights where tenants have consented to inspections of their

own apartments and common areas (A21a-22a). See, United States v. Buettner - Janusch, 646 F.2d 759 (2d Cir.), cert. denied, 454 U.S. 830 (1981) (persons with control over a common areas can consent to a search). Petitioner alleges that the inspections in this case were unsolicited (Pet., p. 14). The District Court, however, found that petitioner failed to produce any evidence creating an issue of fact in opposition to HPD's proof that access for the inspections was provided by tenants. The fact that the District Court may have erred in making this finding is not a basis for granting a writ of certiorari.

Finally, the District Court properly held that petitioner's claim that she is subjected to excessive fines is not ripe for review because there have been no

fines imposed, no enforcement proceedings commenced, and no liability for fines determined (A24a-A25a). Cheffer v. Reno, 55 F.3d 1517, 1523 (11th Cir., 1995) ("Eighth Amendment challenges generally are not ripe until the imposition, or immediately impending imposition, of a challenged punishment or fine").

Contrary to petitioner's argument (Pet., pp 16-17), this case is not in conflict with Steffel v. Thompson, 415 U.S. 452 (1974) or Ex parte Young, 209 U.S. 123 (1908). In Steffel, petitioner challenged a criminal statute which threatened prosecution for the exercise of his first amendment rights. The issue there was whether federal declaratory relief was available where there has been no pending state criminal prosecution. This case does not involve the chilling

effect threatened prosecution has on the exercise of first amendment rights.

In Young, the statute involved threatened criminal prosecution and severe penalties for the failure to comply with a railroad rate schedule setting forth the rates which could be charged to the public. The petitioners alleged that the rates were so low that the statute constituted a taking of property. This Court determined that petitioners could challenge the statute even though there has been no violation of the statute and thus, no enforcement action taken. This Court reasoned that no one would risk prosecution by overcharging in violation of the statute. Thus, Court review of the statute would be effectively foreclosed if a pending prosecution was a precondition to a

challenge. This case does not present the concerns voiced by this Court in Ex-Parte Young to support an exception to the general rule that Eighth Amendment claims are not ripe for review until there has been, or there is an impending imposition of, fines.

For all the above reasons, the petition for a writ of certiorari should be denied.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

PAUL A. CROTTY,
Corporation Counsel of
the City of New York,
Attorney for Respondents.

LEONARD J. KOERNER,*
PAMELA DOLGOW,
FAY NG,
of Counsel.

*Attorney of Record

Supreme Court, U.S.
FILED
OCT 5 1995
CLERK

No. 95-224

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

BARBARA KRAEBEL Doing Business As
BARKLEE REALTY COMPANY,

Petitioner,

-against-

FELICE MICHETTI, As Commissioner Of
The New York City Department Of Housing
Preservation And Development, and
THE NEW YORK CITY DEPARTMENT OF
HOUSING PRESERVATION AND DEVELOPMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF

Barbara Kraebel D/B/A
Barklee Realty Company
Petitioner pro se
60 East 42nd Street - #1146
New York, New York 10165
Telephone: (212) 831-1012

October 5, 1995

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

I. RESPONDENTS' BRIEF IN OPPOSITION MISREPRESENTS THE RECORD IN TWO SIGNIFICANT PARTICULARS 1

II. RESPONDENTS' ABUSE OF THEIR AUTHORITY OVER HOUSING MAINTENANCE CODE VIOLATIONS HAS A CHILLING EFFECT ON THE CONSTITUTIONALLY-PROTECTED RIGHTS OF PROPERTY OWNERS 2

CONCLUSION 3

No. 95-224

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

BARBARA KRAEBEL Doing Business As
BARKLEE REALTY COMPANY,

Petitioner,

-against-

FELICE MICHETTI, As Commissioner Of
The New York City Department Of Housing
Preservation And Development, and
THE NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF

I. RESPONDENTS' BRIEF IN OPPOSITION MISREPRESENTS THE RECORD IN TWO SIGNIFICANT PARTICULARS.

Respondents have never had any substantive meeting with Petitioner concerning the Violations*, as implied by Brief In Opposition (Resp. Opp.) FN 3 p. 7. The only meetings Petitioner has ever had with Respondents with respect to the Violations were with HPD's Public Interviewers, who had no knowledge of building conditions at the Property and no authority to remove any of the Violations. JA:56** par. 88; JA:133-134 pars. 17-18.

Respondents misstate the procedures for obtaining maximum base rent increases under State procedures when HMC Violations are reported against a property (Resp. Opp. p. 20). In such circumstances the owner must both certify to correction and provide documentary proof of correction or grounds for challenge. JA:184-185 pars. 36-38; JA:266.

II. RESPONDENTS' ABUSE OF THEIR AUTHORITY OVER HOUSING MAINTENANCE CODE VIOLATIONS HAS A CHILLING EFFECT ON THE CONSTITUTIONALLY-PROTECTED RIGHTS OF PROPERTY OWNERS.

Respondents' contention that only First Amendment rights are chilled by government excess is not well taken. Respondents' abuse of their authority over HMC Violations has a chilling effect on the rights of property owners when such owners can neither comply with Respondents' unreasonable requirements and unworkable procedures nor

---

* Terms herein are as defined in the Petition For A Writ Of Certiorari.

** Numbers after JA: refer to pages in the Joint Appendix to the Second Circuit Court of Appeals.

challenge them without unacceptable risk. This chilling effect has contributed substantially to owner abandonment and City confiscation of vast tracts of privately-owned housing in New York City low income neighborhoods through the years. JA:62-65 pars. 120-131; JA:133 pars. 14-16.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition For A Writ Of Certiorari, a writ of certiorari should be issued to review the opinion and judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

Barbara Kraebel D/B/A
Barklee Realty Company
Petitioner pro se
60 East 42nd Street - #1146
New York, New York 10165
Telephone: (212) 831-1012

October 5, 1995